TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1928

No. 469

EX PARTE WORCESTER COUNTY NATIONAL BANK OF WORCESTER, APPELLANT

APPEAL FROM THE PROBATE COURT FOR WORCESTER COUNTY, STATE OF MASSACHUSETTS

FILED SEPTEMBER 21, 1928

(33,778)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 7, 1928

[fol. 1]

IN PROBATE COURT OF WORCESTER COUNTY

Paper #1

COMMONWEALTH OF MASSACHUSETTS:

PRECIPE OF TRANSCRIPT OF RECORD—Filed Sept. 18, 1928

To the Honorable the Judges of the Probate Court in and for the County of Worcester:

You are hereby requested to incorporate into the transcript of the record in the matter of the appeal of the Worcester County National Bank of Worcester, to the Supreme Court of the United States, in Case No. 88495, Estate of Julia A. Legnard, which appeal was allowed Sept. 12, 1928—

1. Will of Julia A. Legnard.
2. Petition for Probate of will and decree.
3. Bond.
4. Letter testamentary.
5. First and Final Account with finding of material facts and Report to the Supreme Judicial Court.
6. Rescript and Opinion of the Full Court.
7. Final Decree of Probate Court.
8. Petition for Appeal and its allowance.
8A. Waiver of Notice.
9. Bond for Appeal and its approval.
10. Pracipe.

The appellant deems the above portions of the record to be material and necessary for a decision of said case on appeal, and prays that a transcript of the record, proceedings and papers in this case, as above set forth, duly authenticated, be sent forthwith to the Supreme Court of the United States.

William T. Forbes, Attorney for Worcester County National Bank, Appellant.

[File endorsement omitted.]

Paper #2

[fol. 2] Register's certificate to transcript omitted in printing.

[fol. 3] In Probate Court of Worcester County

Paper #3

Will of Julia A. Legnard—Filed March 17, 1926

Will Allowed Apr. 21, 1926

I, Julia A. Legnard, widow of Solomon Legnard, of Fitchburg in the County of Worcester and Commonwealth of Massachusetts, being of sound and disposing mind and memory, do make, publish and declare this my last will and testament.

First. I direct my Executor hereinafter named to pay all my just debts and funeral expenses as soon as conveniently may be after my decease.

Second. I give and bequeath to my friend, Josephine Small, wife of Patrick Small of Leominster, in said County, three hundred dollars. In case she deceases before me I direct that this three hundred dollars shall become a part of the residue of my estate.

Third. I give and bequeath to my daughter-in-law, M. Evelyn F. Chainey, now wife of Wilfred Chainey of said Leominster, two hundred dollars. In case she deceases before me I direct that this two hundred dollars shall become a part of the residue of my estate.

Fourth. I give and bequeath to the Pastor for the time being of St. Bernard's Church in said Fitchburg, two hundred dollars for the perpetual care of my cemetery lot and of the cemetery lot standing in the name of my father, Patrick J. Brennan in St. Bernard's Cemetery in said Fitchburg.

[fol. 4] Fifth. I give and bequeath to my grandson, Guy C. H. Fletcher, son of William H. Fletcher, deceased, and of my said daughter-in-law M. Evelyn F. Chainey, now wife

of Wilfred Chainey of said Leominster, all my household furniture and my automobile.

Sixth. All the rest, residue and remainder of my estate, real and personal, I give, devise and bequeath to the Fitchburg Bank and Trust Company of said Fitchburg, in said County, in trust nevertheless for the following purposes, namely: to keep invested as I now have my estate invested and upon my said grandson Guy C. H. Fletcher reaching the age of twenty-one years, I direct my said Trustee to pay over and deliver to my said grandson Guy C. H. Fletcher the accrued income and principal of said trust fund, discharged of all trust; and in case said grandson shall not attain the age of twenty-one years, upon his decease to pay over said principal sum and all accrued income to my legal heirs.

And I nominate, constitute and appoint said Fitchburg Bank and Trust Company sole Executor of this my will and request that it be not required to furnish a surety or sureties on its official bond as such Executor.

In testimony whereof I have hereunto set my hand and seal this twelfth day of January in the year one thousand nine hundred and twenty-six.

Julia A. Legnard. (Seal.)

[fol. 5] Signed, sealed, published and declared by the said Julia A. Legnard, as and for her last will and testament, in the presence of us, who in her presence and in the presence of each other and at her request have hereunto set our names as witnesses.

Dora C. McMaster, Eva E. Matson, Thornton K. Ware.

A true copy. Attest: Grace C. Rundlett, Asst. Register.

[fol. 6] In Probate Court of Worcester County

Paper #4

Application to Approve and Allow Will and Order Thereon

[Minors must be so designated, and the names of their guardians, if any, given. The heirs at law and next of kin

may be determined by reference to Chapters 190 and 193 of the General Laws.]

To the Honorable the Judges of the Probate Court in and for the County of Worcester:

Respectfully represents Fitchburg Bank & Trust Co., of Fitchburg, in the County of Worcester, that Julia A. Legnard, who last dwelt in Fitchburg, in said County of Worcester, died on the fourteenth day of March, in the year of our Lord one thousand nine hundred and twenty-six, possessed of goods and estate remaining to be administered, leaving as her only heir at law and next of kin, the person whose name, residence and relationship to the deceased are as follows, viz.: Name: Guy C. H. Fletcher (minor no guardian); residence: Leominster, Mass.; relationship: Grandson; that said deceased left a will, herewith presented, wherein your petitioner is named executor and wherein the testatrix has requested that your petitioner be exempt from giving a surety on their bond.

Wherefore your petitioner prays that said will may be proved and allowed and letters testamentary issued to them, without giving a surety on their official bond, and certifies that the statements herein contained are true to the best of their knowledge and belief.

Dated this seventeenth day of March, A. D. 1926.

Fitchburg Bank & Trust Co. J. C. Andrew, Trust Officer, (Street and No.:) 396 Main St., Fitchburg, Mass.

WORCESTER, ss:

Subscribed and sworn to this 17th day of March, A. D. 1926.

Before me, M. Harold Johnstone, Notary Public. (Seal.)

The undersigned, being all the persons interested in the estate who are of full age and legal capacity, other than creditors, and the guardians of persons interested therein, hereby consent that the above named petitioner be exempt from giving any surety on h- bond, and assent to the foregoing petition, and to the allowance of the will without testimony.

[fol. 7] COMMONWEALTH OF MASSACHUSETTS,
Worcester, ss:

At a Probate Court Holden at Worcester, in and for said County of Worcester, on the Twenty-first Day of April, in the Year of our Lord One Thousand Nine Hundred and Twenty-six

On the petition of Fitchburg Bank & Trust Company, of Fitchburg, in the County of Worcester, praying that the instrument therewith presented, purporting to be the last will and testament of Julia A. Legnard, late of Fitchburg, in said County of Worcester, deceased, may be proved and allowed, and letters testamentary issued to it, the executor therein named, without giving a surety on its bond, the guardian ad litem having assented, and the heirs at law, next of kin and all other persons interested, having been notified, according to the order of the Court, to appear and show cause, if any they have, against the same; and no party objecting thereto, and it appearing that said instrument is the last will and testament of said deceased and was legally executed, and that said testatrix was, at the time of making the same, of full age and sound mind, and that said petitioner is competent to be appointed to said trust:

It is therefore decreed that said instrument be approved and allowed as the last will and testament of said deceased and letters testamentary be issued to said petitioner, it first giving bond, without sureties, for the due performance of said trust.

Fredk. H. Chamberlain, Judge of Probate Court.

[fol. 8] IN PROBATE COURT OF WORCESTER COUNTY

Paper #5

BOND OF FITCHBURG BANK AND TRUST CO.—Filed Mar. 17, 1926; approved April 21, 1926

Know all men by these presents that we Fitchburg Bank & Trust Co., of Fitchburg, in the County of Worcester, in the Commonwealth of Massachusetts, am holden and stand

firmly bound and obliged unto Frederick H. Chamberlain, Esquire, Judge of the Probate Court in and for the County of Worcester, in the full and just sum of seven thousand five hundred dollars, to be paid to said Judge and his successors in said office; to the true payment whereof we bind ourselves and our successors or assigns, by these presents. Sealed with my seal, and dated the seventeenth day of March, in the year of our Lord one thousand nine hundred and twenty-six.

The condition of this obligation is such that if the above-bounden Fitchburg Bank & Trust Co., executor of the last will and testament of Julia A. Legnard, late of Fitchburg, in said County of Worcester, deceased, testate, shall:

First, make and return to said Probate Court, within three months after their appointment, a true inventory of all the real and personal estate of said deceased which at the time of the making of such inventory shall have come to the possession or knowledge of said executor;

Second, administer according to law and to the will of said deceased all the personal estate of said deceased which may come to the possession of said executor, or of any person for them and also the proceeds of any of the real estate of said deceased that may be sold or mortgaged by said executor; and,

Third, render upon oath, a true account of their administration at least once a year, until their trust is fulfilled, unless they are excused therefrom in any year by said Court, and also render such account at such other times as said Court may order;

Then this obligation to be void, otherwise to remain in full force and virtue.

Fitchburg Bank & Trust Co. J. C. Andrew, Trust Officer.

Signed, sealed and delivered in presence of M. H. Johnstone.

WORCESTER, ss:

April 21, A. D. 1926, examined and approved.
Fred'k H. Chamberlain, Judge of Probate Court.

[Fill out the certificate on the other side]

Fitchburg Bank & Trust Co.

I, James C. Andrew, acting for the within-named executor, declare that, to the best of my knowledge and belief, the estate and effects of the within-named deceased do not exceed in value the following mentioned sums, viz: Real Estate, none; personal estate, $5,000.00.

(Sign.) Fitchburg Bank & Trust Co. James C. Andrew, Trust Officer.

[fol. 9] IN PROBATE COURT OF WORCESTER COUNTY

Paper #6

EXECUTOR'S LETTER

(Seal.)

To Fitchburg Bank & Trust Company, of Fitchburg, in the County of Worcester and Commonwealth aforesaid:

You are appointed executor of the last will and testament of Julia A. Legnard, late of Fitchburg, in said County of Worcester, deceased, testate, which will was proved and allowed on the twenty-first day of April, A. D. 1926, by said Court, and is now of record in this Court;

And you are required to make and return into said Probate Court, within three months from the date hereof, a true inventory of all the real and personal estate of said deceased which at the time of the making of such inventory shall have come to your possession or knowledge;

To administer according to law and to the will of said deceased all the personal estate of said deceased which may come to your possession, or that of any person for you, and also the proceeds of any of the real estate of said deceased that may be sold or mortgaged by you;

To render upon oath, a true account of your administration, at least once a year, until your trust is fulfilled, unless excused therefrom in any year by said Court;

And also, within three months, to cause notice of your appointment to be posted in two or more public places in the city or town in which the deceased last dwelt, or cause the same to be published once in each week for three successive weeks in the Fitchburg Daily Sentinel, a newspaper published in Fitchburg, and return your affidavit of having given such notice, with a copy thereof, to the Probate Court.

Witness Frederick H. Chamberlain, Esquire, Judge of said Court, at Worcester, this twenty-first day of April, in the year of our Lord one thousand nine hundred and twenty-six.

L. E. Felton, Register.

[fol. 10] In Probate Court of Worcester County

Paper #7

G. L., Chap. 206, § 2

Application for Allowance of Executor's First and Final Account and Order Thereon

[Rule IX. "No executor or administrator shall receive any compensation by way of a commission upon the estate by him administered but shall be allowed his reasonable expenses incurred in the execution of his trust, and such compensation for his services as the Court in each case may deem just and reasonable. The account shall contain an itemized statement of the expenses incurred, and shall be accompanied by a statement of the nature of the services rendered and of such other matters as may be necessary to enable the Court to determine what compensation is reasonable."]

The First and Final Account of Fitchburg Bank & Trust Company, executor of the last will and testament of Julia A. Legnard, late of Fitchburg, in the County of Worcester, deceased

This account is for the period beginning with the twenty-first day of April, A. D. 1926, and ending with the ninth

day of February, A. D. 1928. This account is rendered by the Worcester County National Bank of Worcester for said Bank & Trust Company to June 27, 1927, and thereafter as its own account.

Said accountant charges itself with the several amounts received, as stated in Schedule A, herewith exhibited	$5,589 73
And asks to be allowed for sundry payments and charges, as stated in Schedule B, herewith exhibited	5,589 73
Balance as stated in Schedule C, herewith exhibited	None.

Worcester County National Bank of Worcester, by C. A. Evans, Vice-President & Trust Officer, Successor to Fitchburg Bank & Trust Company, Executor. The said Fitchburg Bank & Trust Co. was consolidated with the Merchants National Bank of Worcester under charter of latter & under title of Worcester County National Bank of Worcester. See certificate of Comptroller of Currency, on file.

The undersigned, being all persons interested, having examined the foregoing account, request that the same may be allowed without further notice.

Evelyn M. Fletcher, Guardian for Guy C. H. Fletcher; Evelyn M. Chainey, Worcester County National Bank of Worcester, Trustee, by J. C. Andrew, Asst. Cashier.

WORCESTER, ss:

February 11, 1928.

Then personally appeared C. A. Evans in behalf of the above-named accountant and made oath that the within account is just and true.

Before me,

William T. Forbes, Justice of the Peace.

COMMONWEALTH OF MASSACHUSETTS,
Worcester, ss:

At a Probate Court held at Worcester, in said County, on the fourteenth day of June, A. D. 1928, the foregoing account having been presented for allowance, after rescript from the Supreme Judicial Court (Full Court) and pursuant to the terms of said rescript, it appearing that the Worcester County National Bank of Worcester, the accountant and petitioner in this case, has not succeeded the Fitchburg Bank & Trust Company as executor of the will of said testatrix and is not entitled to render this account, this petition for the allowance of the same is hereby dismissed.

Fredk. H. Chamberlain, Judge of Probate Court.

[fol. 11] IN PROBATE COURT OF WORCESTER COUNTY

Paper #8

Estate of JULIA A. LEGNARD

In the Matter of Allowance of First and Final Account

RESERVATION AND REPORT

Finding of Material Facts and Report

The Worcester County National Bank of Worcester, a corporation organized under the laws of the United States and located in the City of Worcester in this Commonwealth, with one branch in the City of Fitchburg, in said Commonwealth, has filed a first and final account in this Court and requests its allowance; the first page of which account is as follows, viz:

The First and Final Account of Fitchburg Bank & Trust Company executor of the last will and testament of Julia A. Legnard late of Fitchburg in the County of Worcester, deceased.

This account is for the period beginning with the twenty-first day of April A. D. 1926, and ending with the ninth day of February A. D. 1928. This account is rendered by the

Worcester County National Bank of Worcester for said Bank & Trust Company, to June 27, 1927 and thereafter as its own account.

Said accountant charges itself with the several amounts received, as stated in Schedule A, herewith exhibited	$5,589 73
And asks to be allowed for sundry payments and charges, as stated in Schedule B, herewith exhibited	5,589 73
Balance as stated in Schedule C, herewith exhibited	$ None

Worcester County National Bank of Worcester, by C. A. Evans, Vice-President & Trust Officer, Successor to Fitchburg Bank & Trust Company. The said Fitchburg Bank & Trust Co. was consolidated with the Merchants National Bank of Worcester under charter of latter & under title of Worcester County National Bank of Worcester. See Certificate of Comptroller of Currency, on file.

The undersigned, being all persons interested, having examined the foregoing account, request that the same may be allowed without further notice.

Evelyn M. Fletcher, Guardian for Guy C. H. Fletcher; Evelyn M. Chainey, Worcester County National Bank of Worcester, Trustee, by J. C. Andrew, Asst. Cashier.

[fol. 12] Worcester, ss: February 11, 1928.

Then personally appeared C. A. Evans in behalf of the above-named accountant and made oath that the within account is just and true.

Before me,

William T. Forbes, Justice of the Peace.

The Fitchburg Bank & Trust Company, a corporation organized under the laws of this Commonwealth, was appointed by this Court executor of the will of Julia A. Legnard, April 21, 1926, and qualified by giving bond approved

on that date, and there has been no change in the administration of her estate since the time of said appointment, so far as appears of record in this Court, unless the consolidation hereinafter set forth, and notice of the same filed in this Court, constitutes a change in said executorship, or gives the petitioner the right to render this account and request its allowance.

The accountant claims that in view of the proceedings hereinafter stated, it is its right and duty to render to this Court the account now presented for allowance and that the same having been assented to by all parties interested, that it should be allowed by this Court.

I find that this account is in proper form for allowance and should be allowed as rendered, if the said Worcester County National Bank, as successor or otherwise, is executor of said will, or has the right to render said account under the laws of the United States.

The Merchants National Bank of Worcester, a national bank organized under the laws of the United States and located in said City of Worcester, and said Fitchburg Bank & Trust Company, located in the same County of Worcester, were consolidated June 27, 1927 under the charter of the Merchants National Bank of Worcester, and under the corporate title of the Worcester County National Bank of Worcester, as appears from the Certificate of the Comptroller of the Currency, a copy of which is as follows:—

Certificate Approving Consolidation of National Bank

Form 1924. Charter No. 7595. Consol. No. 190

Treasury Department, Office of the Comptroller of the Currency, Washington, D. C.

June 27, 1927.

Whereas, by satisfactory evidence presented to the undersigned, it has been made to appear that the directors and shareholders of The Merchants National Bank of Worcester, and State of Massachusetts, and the directors and shareholders of Fitchburg Bank and Trust Company, located in the City of Fitchburg, in the County of Worcester, and State of Massachusetts, have complied with all the

provisions of an Act of Congress, entitled "An Act [fol. 13] to provide for the consolidation of National Banking Associations," approved November 7, 1918: as amended February 25, 1927;

Now, Therefore, I, Joseph W. McIntosh, Comptroller of the Currency, do hereby certify that The Merchants National Bank of Worcester and Fitchburg Bank and Trust Company have been consolidated under the charter of The Merchants National Bank of Worcester, and under the corporate title of Worcester County National Bank of Worcester, with capital stock of One Million Eight Hundred and Seventy Five Thousand Dollars ($1,875,000.) and that the consolidation is approved. The consolidated bank has one branch located in the City of Fitchburg.

In Testimony Whereof, witness my hand and Seal of Office this 27th day of June, 1927. "Currency Bureau. Seal of the Comptroller of the Currency, Treasury Department."

(Signed) J. W. McIntosh, Comptroller of the Currency. (Seal.)

A true copy of the record. Attest: Arthur W. Snow, Notary Public. (Seal.)

The accountant has the permission of the Federal Reserve Board, granted pursuant to the provisions of Section 11(k) of the Act of Congress approved December 23, 1913, known as the Federal Reserve Act, to act as executor and has continuously had such permission since March 24, 1915.

There are many estates now being administered in this County by this accountant, the Worcester County National Bank of Worcester, under a claim of right by virtue of said Acts of Congress, where the Fitchburg Bank & Trust Company was appointed administrator, executor, trustee, or in some other fiduciary capacity prior to said consolidation, and where no new appointment of said Worcester County National Bank of Worcester in place of, or as successor to said Fitchburg Bank & Trust Company has been made by decree of this Court.

Without action upon said account, I report the above facts and the question of law involved, for the consideration

and determination of the Full Court, as to whether the petitioner is entitled to render said account.

Fredk. H. Chamberlain, Judge of Probate Court.

Filed February 15, 1928.

A true copy. Attest: Leon E. Felton, Register. Probate Court, Worcester, Massachusetts.

[fol. 14] Paper #9

In Supreme Judicial Court of Massachusetts, at Boston, May 24, 1928

Rescript

In the case of Estate of Julia A. Leonard, in Matter of Allowance of First and Final Account, Worcester County National Bank of Worcester, Accountant, Petitioner, Pending in the Probate Court for the County of Worcester,

Ordered that the register of probate and insolvency in said county make the following entry under said case in the docket of said court; viz: The question reported, namely, "Whether the petitioner is entitled to render said account," is answered in the negative. Probate Court instructed accordingly.

By the Court,

Walter F. Frederick, Clerk.

May 24, 1928.

[fol. 15] Brief Statement of the Grounds and Reason of the Decision

The reasons of the decision are set forth at length in the opinion, filed with the Reporter of Decisions, to which reference is made.

[fol. 15½] Filed June 1, 1928. Attest: Frank L. Dean, Clerk.

Filed June 13, 1928. Recorded Vol. 1076, Page 335.
A true copy. Attest: Carl E. Wahlstein, Ass't Register Probate Court.

[fol. 16] In Supreme Judicial Court of Massachusetts

Paper #10

Commonwealth of Massachusetts:

I, Ethelbert V. Grabill, Reporter of Decisions of the Supreme Judicial Court of the Commonwealth of Massachusetts, hereby certify that the following seventeen (17) pages comprise the opinion of that court, filed with me in the case of Worcester County National Bank, petitioner, decided on the twenty-fourth day of May, 1928.

Ethelbert V. Grabill, Reporter of Decisions.

Opinion

Rugg, C. J.:

This case is reported on a finding of material facts for determination whether the petitioner is entitled to render the account. The pertinent facts are that the Fitchburg Bank & Trust Company, a corporation organized under the laws of this Commonwealth, was appointed on April 21, 1926, by the appropriate court of probate executor of the will of Julia A. Legnard and qualified by giving bond. No change in the administration of this estate appears on the court records. The said Fitchburg Bank & Trust Company, located within our county of Worcester, consolidated with the Merchants National Bank of Worcester, a national banking association organized under the laws of the United States and also located within our county of Worcester, under the corporate title, Worcester County National Bank of Worcester, pursuant to the provisions of the Act of Congress approved on February 25, 1927, c. 91, § 1, 44 U. S. Sts. at Large, Part II, 1224, 1225, amending an Act approved November 7, 1918, c. 209, 40 U. S. Sts. at Large, 1044, by adding at the end of said c. 209 a new section, being § 3 thereof. For convenience, this will be referred to hereafter in this opinion as said § 3. See Act of Congress of May 1, 1886, c. 73, § 2, 24 U. S. Sts. at Large, 18.

The certificate approving the consolidation is dated June 27, 1927. It is assumed that the consolidation took effect on that date.

The first statute purporting to authorize a trust company organized under the laws of the State to consolidate di- [fol. 17] rectly with a national banking association was said § 3. Its provisions, so far as material to the grounds of this decision, are that any bank, defined to include a trust company, incorporated under the laws of any State, "may be consolidated with a national banking association located in the same county * * * under the charter of such national banking association on such terms and conditions as may lawfully be agreed upon" in the manner specified; "and all the rights, franchises, and interests of such State * * * bank so consolidated with a national banking association in and to every species of property, real, personal, and mixed, and choses in action thereto belonging, shall be deemed to be transferred to and vested in such national banking association into which it is consolidated without any deed or other transfer, and the said consolidated national banking association shall hold and enjoy the same and all rights of property, franchises, and interests including the right of succession as trustee, executor, or in any other fiduciary capacity in the same manner and to the same extent as was held and enjoyed by such State * * * bank so consolidated with such national banking association. * * * No such consolidation shall be in contravention of the law of the State under which such bank is incorporated."

First. The first question to be decided is whether consolidation of a Massachusetts trust company with a national banking association is permissible and valid as provided for in said § 3. On this aspect of the case we shall deal only with consolidation in its general features and leave for later consideration the meaning and effect, as declared in said § 3, of such consolidation on the Massachusetts corporation and its fiduciary appointment by the court of probate, and whether those provisions are in contravention of the law of this Commonwealth.

There is no statute of this Commonwealth prohibiting in terms the consolidation of a trust company organized under

the authority of Massachusetts laws with a national bank. We are of opinion that there is no policy of the Commonwealth declared in any statutes on the subject of such consolidation. It is provided by G. L. c. 172, § 44, as amended [fol. 18] by St. 1922, c. 292, that "No trust company shall be merged in or consolidated with another trust company except" upon the terms and in the manner there specified. These statutory words in their context and by the express terms of G. L. c. 172, § 1, refer exclusively to trust companies organized under the laws of this Commonwealth. These statutory words, although they do not authorize, do not prohibit a consolidation of a Massachusetts trust company with a national bank. Further provisions of said § 44 as amended touching "the sale or exchange of all the property and assets, including the good will and corporate franchise, of a trust company" have no relevancy to the facts disclosed on this record because a consolidation such as here is in issue is not "a sale or exchange" of the property and assets of the trust company. The final sentence of said § 44 as amended is thus: "The charter of a trust company the business of which shall, on or after July first, nineteen hundred and twenty-two, be consolidated or merged with, or absorbed by, another bank or trust company, shall be void except for the purpose of discharging existing obligations and liabilities." It is to be observed that here for the first time occur the words "another bank" coupled with the words "trust company." The use of the word "bank" in this connection, in a chapter devoted solely to the subject of trust companies, bears some indication of legislative recognition of the fact that a consolidation or merger of a trust company with a "bank" was contemplated. By said c. 172 and by G. L. c. 167, a bank is a different institution from a trust company. So far as we are aware or have been able to discover, there is no statute of this Commonwealth authorizing any State bank, as distinguished from a trust company, to consolidate with a trust company; and there is no statute, except said § 44 as amended, authorizing a trust company to consolidate with another institution transacting any branch of the business of banking. The use of the word "bank" in the context shown in said § 44 as amended

renders it impracticable to hold rightly that consolidation of a trust company with a national bank, subject to the limitation expressed in the final sentence of said § 44 as [fol. 19] amended, is contrary to declared legislative policy even though at the time of the enactment of St. 1922, c. 292, no such direct consolidation was permissible under any Act of Congress. An indirect and round-about method of consolidation theretofore was possible by means (1) of the conversion of a trust company into a national bank under U. S. Rev. Sts. § 5154, and (2) of the consolidation of the national bank thus established with another national bank under the charter of such other national bank under Act of Congress of November 7, 1918, c. 209, 40 U. S. Sts. at Large, 1043. That method has been followed in some instances, as shown by the record in Commonwealth Atlantic National Bank of Boston, petitioner, 249 Mass. 440. The Legislature may have had that method of accomplishing the result in mind in phrasing the final sentence of said c. 292. It would have been simple for the Legislature to have declared that such consolidation or merger was in contravention of the policy of the Commonwealth if such had been its purpose.

There is no provision in the statutes of this Commonwealth authorizing or recognizing the consolidation of a trust company or bank organized under such statutes with a national banking association. Formerly there were statutes respecting the conversion of a State bank into a national bank under Act of Congress of June 3, 1864, c. 106, § 44, 13 U. S. Sts. at Large, 112, now U. S. Rev. Sts. § 5154. See St. 1863, c. 244, St. 1864, c. 190. Of course these early statutes never were applicable to a consolidation of a State bank with a national bank, which appears first to have been authorized by said § 3, (44 U. S. Sts. at Large, Part II, 1225, 1226). But those early statutes were repealed by Pub. Sts. c. 224. It is quite possible that that repeal came about because such statutes were thought to be unnecessary in view of the decision in Casey v. Galli, 94 U. S. 673, to the effect that no enabling State statute was required to accomplish such change and conversion.

This review of the statutes of this Commonwealth shows that there has been no exercise of whatever power may reside in the State to declare a general policy against the

consolidation of a State trust company with a national [fol. 20] bank. Thereby in effect that field is left open to the exercise by Congress of whatever power it possesses over that subject. Commonwealth v. Nickerson, 236 Mass. 281, 292, 293. Such consolidation, however, must be subject to the limitation already quoted from the final sentence of St. 1922, c. 292, amending G. L. c. 172, § 44.

It follows that, speaking broadly, the consolidation of a Massachusetts trust company with a national banking association is not "in contravention of the law" of this Commonwealth, subject to the limitation in St. 1922, c. 292, amending G. L. c. 172, § 44, and to the limitations hereinafter stated.

The question was directly raised in Casey v. Galli, 94 U. S. 673, whether a State bank could change its organization into that of a national banking association without any authority given by the State law in its charter or otherwise to make the change. It was said at page 678, "No authority from the State was necessary to enable the bank so to change its organization. The option to do that was given by the forty fourth section of the Banking Act of Congress, 13 Stat. 112. [U. S. Rev. Sts. § 5154.] The power there conferred was ample, and its validity cannot be doubted. The act is silent as to any assent or permission by the State. It was as competent for Congress to authorize the transmutation as to create such institutions originally." We are unable to perceive any sound distinction between the power of Congress to authorize the conversion of a State bank into a national bank and its power to authorize the consolidation of a State bank with a national bank under the charter of the national bank. If no State legislation was necessary to accomplish such conversion, it seems to us that no State legislation is necessary to accomplish such consolidation. Relying upon the authority of Casey v. Galli, 94 U. S. 673, we are of opinion that in general consolidation of a Massachusetts trust company with a national banking association as prescribed in the Act of Congress of February 25, 1927, c. 191, § 3, is permissible and valid.

Second. The next question to be determined is what is the legal effect of such consolidation upon the trust com-

[fol. 21] pany and upon the national bank. The words of said § 3 (44 U. S. Sts. at Large, Part II, 1225, 1226) are explicit to the point that the consolidation shall be "under the charter of such national banking association." This of itself is clear indication of intent that the State trust company shall not continue as a corporation in combination with the national bank. The words of St. 1922, c. 292, amending G. L. c. 172, § 44, are equally explicit that upon any consolidation of a Massachusetts trust company, whether with a bank or another trust company, its charter "shall be void except for the purpose of discharging existing obligations and liabilities." The statutes of this Commonwealth upon the subject of a trust company, owing its creation and existence exclusively to those statutes, must be valid and binding to this extent. The later provision of said § 3 that there shall be transferred to the national banking association and be held by it among other things the "franchise" of the State bank, cannot mean its right to be a corporation. The right to transfer franchise powers of a corporation organized under the laws of one sovereignty to a corporation organized under the laws of a different sovereignty is extraordinary. It cannot be implied in the absence of explicit statutory enactment to that end. There is no such provision in the statutes of this Commonwealth. Any other conclusion would be in contravention of the laws of this Commonwealth. It is manifest from the terms of said § 3 (44 U. S. Sts. at Large, Part II, 1225, 1226) and from the terms of said St. 1922, c. 292, that the charter of the trust company here in question became void on the consolidation (except for purposes not here material), and that the only corporation now operative is the national bank. The trust company as a Massachusetts corporation has ceased to be an institution capable of transacting business. The national bank existing before the consolidation has continued to exercise all its functions without alteration or modification under the same charter since the consolidation as before. The consolidation contemplated by said § 3 is an absorption of the State bank with all its assets by the national banking association, which retains its corporate identity. Its provisions differ in this particular from many statutes authorizing the consolidation of corporaions, which effect

[fol. 22] the extinguishment of the constituent corporations and the establishment of a new corporation.

There is no requirement in said § 3 (44 U. S. Sts. at Large, Part II, 1225, 1226) or elsewhere, so far as we can discover, that the comptroller of the currency must issue a certificate of consolidation, although there is an implication in the provision touching dissenting stockholders (not herein quoted) that he must approve such consolidation. The certificate printed in the record cannot be thought to be more than the signification of approval of the consolidation by the comptroller of the currency. It is in no sense a charter. By the very terms of said § 3, the consolidation is "under the charter of such national banking association," that is, its preëxisting charter, upon which said § 3 casts no invalidity, but which continues unimpaired, and is the only legal basis for the national bank after the consolidation. See U. S. Rev. Sts. § 5169; Act of Congress of July 12, 1882, c. 290, § 2, 22 U. S. Sts. at Large, 162; Act of Congress of April 12, 1902, c. 503, 32 U. S. Sts. at Large, 102.

The result is that the trust company chartered by this Commonwealth has gone out of existence; all its property of every name and nature has gone into the possession and has become the property of the national bank, and the national bank continues its existence and identity under its original charter. The trust company has lost its identity and its assets have become those of the national banking association. The latter is not a newly created organization but an enlargement of the continuously existing national bank. Tomlinson v. Branch, 15 Wall. 460. Central Railroad & Banking Co. v. Georgia, 92 U. S. 665. Yazoo & Mississippi Valley Railway v. Adams, 180 U. S. 1, 19-22. Worcester Bank & Trust Co., petitioner, (Adv. Sh. (1928) 1195.)

In view of this legal effect, in its general aspects, of the consolidation of the trust company with the national bank upon the trust company as a corporation, it must follow that its identity as a fiduciary appointed by the court of probate has not been continued in the national bank, but has been extinguished. Doubtless in many respects it may [fol. 23] be said that the identity of corporations consolidated under the provisions of law is continued in the ab-

sorbing corporation. That is true commonly as to contract obligations. Proprietors of Locks & Canals on Merrimack River v. Boston & Maine Railroad, 245 Mass. 52, 59, and cases cited. Atlantic National Bank v. Harris, 118 Mass. 147. Iowa Light, Heat & Power Co. v. First National Bank of Boston, 250 Mass. 353, 354. In discussing questions of that nature broad language may be found in opinions of courts. In Michigan Ins. Bank v. Eldred, 143 U. S. 293, 300, occur these words by Mr. Justice Gray: "the plaintiff corporation, having been originally created by the laws of Michigan, had, in accordance with the National Banking Act, become a national bank, and its name had been changed accordingly, without affecting its identity, or its right to sue upon obligations or liabilities incurred to it by its former name. Act of June 3, 1864, c. 106, § 44; 13 Stat. 112; Rev. Stat. § 5154; Metropolitan Bank v. Claggett, 141 U. S. 520." In the latter case it was said at page 527: "the change or conversion" of a State bank into a national bank under U. S. Rev. Sts. § 5154, "did not 'close its business of banking' nor destroy its identity or its corporate existence, but simply resulted in a continuation of the same body with the same officers and stockholders, the same property, assets, and banking business under a changed jurisdiction; that it remained one and the same bank." It may be noted that scarcely any of the facts thus enumerated as decisive exist in the case at bar with reference to the trust company and the national bank. Plainly the conversion of a State bank into a national bank under consideration in the two cases last cited differs in essential particulars from a consolidation such as is disclosed on this record. The expressions just quoted were used in judgments touching contract litigation, and must be interpreted as applicable to the facts then before the court. Such expressions and decisions occurring in different connections and rendered upon different issues cannot rightly be stretched to include a situation like that here presented. Cohens v. Virginia, 6 Wheat. 264, 399. Swan v. Justices of the Superior Court, 222 Mass. 542, 545, and cases collected. [fol. 24] They are not applicable to the peculiar positions of trust like executor, administrator, and other fiduciaries, established under the law and practice of this Commonwealth. It is the duty of a court under our jurisdiction,

before appointing an executor, administrator, trustee or other fiduciary, to inquire carefully as to his character, integrity, soundness of judgment and general capacity, and to make the appointment only after a favorable finding on these points. That duty of inquiry is just as imperative with respect to a trust company or national bank as with respect to an individual.

The suggestion in the brief of the petitioner that, "strictly speaking, a court cannot appoint an executor," is without merit in this connection. Probate courts are required to find that a person named as executor "is legally competent and a suitable person" before issuing letters testamentary. G. L. c. 192, § 4. The form of letter testamentary in common use by probate courts and doubtless approved by this court under G. L. c. 215, § 30, begins with the assertion, after naming the person, "You are appointed executor." He has no legal authority as executor until so appointed. Manifestly the executor is appointed by the court as the result of a judicial decision.

It is quite possible that none of the officers of the Fitchburg Bank & Trust Company, in reliance upon whose character, sagacity and skill the original appointment as executor was made in the case at bar, continues as officers of the national banking association. The stockholders hardly can be the same. Its general policy of business and trust administration may have been entirely altered. Its reputation with respect to these matters may have changed radically as a consequence of the consolidation. The court has had no opportunity to pass upon these essential questions. The failure of several trust companies and at least one national banking association in this Commonwealth within recent years accentuates the importance of such judicial examination of trust companies and national banks before appointing them to positions of trust of this nature in the administration of estates.

It is to be observed that there are no statutory words in said § 3 to the effect that the identity of the State bank as a [fol. 25] fiduciary by appointment of a court is continued in the national bank with which it has been consolidated. The absence of express words in said § 3 declaring the preservation of the identity of the State bank perhaps may not be of decisive significance. If it be assumed that it was

intended by said § 3 to preserve that identity, that result is not accomplished in view of what has of necessity happened in making the consolidation in compliance with said section and already described in detail. Identity with the trust company in the sense in which that word is used under our system of judicial appointments of fiduciaries cannot be attributed to the national bank into which the trust company has been consolidated. The identity of the trust company as such fiduciary cannot be regarded as so continued in view of the express provisions of St. 1922, c. 292, to the effect that on consolidation its charter shall be void. That its identity cannot be held to be thus continued seems to us clear in view of what has been said earlier in this opinion.

The trust arising from appointments to such positions as executor, administrator and the like is highly personal. It is not commercial. It is not contractual. It is not a property right. It involves no pecuniary interest on the part of the fiduciary. Ensign v. Faxon, 224 Mass. 145. Commonwealth-Atlantic National Bank of Boston, petitioner, 249 Mass. 440, 445. Wilkinson v. McIntyre, 254 Mass. 325, 330. A strictly confidential relationship of this nature cannot survive such a transmutation as is wrought by the consolidation of a State bank with a national banking association under the charter of the latter in accordance with the terms of said § 3. To treat the national banking association into which the State trust company has been consolidated as preserving the identity of the trust company in this particular would be contrary to the juridical conception and practice touching the appointment of such fiduciaries under the law of this Commonwealth.

Third. The final question for determination is whether the provision of said § 3 (U. S. Sts. at Large, Part II, 1225, 1226) that the national banking association shall hold and enjoy "the right of succession as trustee, executor, or in [fol. 26] any other fiduciary capacity in the same manner and to the same extent as was held and enjoyed by such State • • • bank," is valid and binding upon the courts of this Commonwealth. This question divides itself into three parts: (1) What do these words mean? (2) Are they in contravention of the law of this Commonwealth? (3) Do they violate any provision of the Constitution?

(1) The words just quoted from said § 3 seem to us to carry the unmistakable import that in case of consolidation the national banking association shall possess and enjoy all appointments as executor, administrator, or other fiduciary held by the absorbed State bank by virtue of any decree of any court without further action by the appointing court, as fully and completely as if it were the State bank, or as if it had originally been appointed to these fiduciary positions by the court. As has already been shown, the trust company has gone out of existence and its charter has become void "except for the purpose of discharging existing obligations and liabilities." The national banking association is a different corporation from the trust company. But under the words of said § 3, resort to the judicial functions of the Probate Court for any purpose in these changed circumstances is unnecessary. No new appointment by the Probate Court is required or contemplated. No notice of the change need be given to that court. The interposition of that court for any purpose would be superfluous.

The original appointment is to continue wholly unaffected by the fact that the State bank, in the case at bar the trust company, whose credit, standing and competency formed the basis of the judicial inquiry and action culminating in that appointment, has ceased to be, and another and different corporation whose credit, standing and competency have never been the subject of judicial inquiry for this purpose, is to act in its place as executor. This seems to us to be the plain meaning of the words of said § 3 now under consideration construed according to the common and approved usage of the language.

(2) The next part of the final question is whether the provisions of said § 3 (44 U. S. Sts. at Large, Part II, 1225, 1226), having the meaning just stated, are "in contraven-[fol. 27] tion of the law" of this Commonwealth under which the trust company was organized. That section, according to its plain interpretation, has a signal force and effect in its application to appointment of fiduciaries by courts of this Commonwealth. That section requires the courts of this Commonwealth to recognize and accept, with-

out inquiry or hearing, as fiduciary in place of a State trust company now gone out of existence, which was appointed by the court by solemn decree, a national bank which is a different corporation established under the laws of a different sovereignty, possessed of different powers, owing allegiance to a different jurisdiction, governed by different laws, subject to different governmental supervision, and controlled by different officers. That requirement relates to a subject in which all beneficiaries and others interested in estates of deceased persons and in the administration of trusts and of other funds for the benefit of minors, insane persons, and the aged and infirm under conservatorship have a vital interest. That requirement relates to a trust estate in process of settlement under the direction of the court. That requirement forecloses a hearing, where the interested parties may present their contentions in an orderly way and where a judicial decision may be rendered. That requirement is made by a pure legislative declaration without more. This touches the very foundations of judicial administration.

It is provided in art. 30 of the Declaration of Rights of this Commonwealth that, "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men." That principal is thoroughly embedded in the governmental principles of this Commonwealth on which law itself is founded. It often has been referred to in judicial decisions. It has been many times applied to the several departments of government. It is of the very fiber of our institutions. As illustrative of other adjudications, reference may be made to Case of Supervisors of Election, 114 Mass. 247, [fol. 28] Boston v. Chelsea, 212 Mass. 127, Dinan v. Swig, 237 Mass. 619,623, Cosmopolitan Trust Co. v. Mitchll, 242 264, 296, Opinion of the Justices, 251 Mass. 569, 615, Sheehan, petitioner, 254 Mass. 342, 345, Opinion of the Justices, 237 Mass. 619, 623, Cosmopolitan Trust Co. v. Mitchell, 242 Mass. 95, 115, 116. Of course that principle has never been and cannot be questioned in the administration of the gov-

ernment of this Commonwealth. The only difficulty that ever arises is in its proper application. The case at bar in respect to the clause of said § 3 now under consideration seems to us to present no difficulty in the application of that principle. To accept that clause as binding would be directly contrary to the spirit and implications of said art. 30. It would be opposed to the underlying notions of the civil society founded upon the Constitution of this Commonwealth. The prohibition on the judiciary against surrendering its powers in compliance with legislative mandate is as imperative as that against exercising the executive or legislative powers. It is of no consequence in this connection from what legislative body the interference with the judicial function may come. Of course we do not decide that art. 30 of the Declaration of Rights can override the Constitution of the United States or any Act of the Congress enacted pursuant to that instrument. Opinion of the Justices, 234 Mass. 597, 607, and cases cited; 237 Mass. 591, 595. Florida v. Mellon, 273 U. S. 12, 17. We are now dealing only with the point whether this provision of said § 3 is "in contravention of the law" of this Commonwealth.

We are therefore of opinion that it is "in contravention of the law" of this Commonwealth in a fundamental sense for the courts to be compelled, in compliance with the mandate of a legislative body, to recognize as a fiduciary a different corporation from the corporation appointed such fiduciary, simply because, without judicial proceedings and by mere act of the stockholders and officers (who may now have ceased to be such) approved by an executive government official, the corporation appointed such fiduciary has been consolidated with it, without any judicial determination as to the fitness of such different corporation to per- [fol. 29] form the duties of fiduciary.

(3) The last part of the final question we have to decide is whether this provision of said § 3 as thus interpreted is within any power conferred upon the Congress by the Constitution of the United States and, if not within such power, whether it is separable from the rest of the act. Plainly the Congress has ample legislative power over national banks. It may require courts of the several States to appoint national banks as fiduciaries upon the same terms as domestic banks are appointed. First National Bank of Bay City v.

Fellows, 244 U. S. 416. Burnes National Bank of St. Joseph v. Duncan, 265 U. S. 17. This court of course recognizes the ample jurisdiction of the Congress to confer upon national banks power to compete with State banks as declared in these two adjudications. Commonwealth-Atlantic National Bank of Boston, petitioner, 249 Mass. 440, 442. This provision of said § 3 goes far beyond that. It does not declare a general policy for the State courts to pursue in performing their judicial functions with respect to national banks. It altogether abolishes the judicial function with respect to a subject essentially judicial in its nature—viz., who shall act as fiduciaries under judicial appointment—and substitutes for that judicial function a legislative determination. The question is not whether the State court should hold a hearing and determine, in accordance with its settled procedure and the guiding federal statute requiring the appointment of national banks upon equal terms with domestic trust companies, whether the particular national bank ought to be appointed to the fiduciary position. It is indubitable that that ought to be done upon appropriate proceedings. I would be done in this Commonwealth according to its most enlightened standards of judicial conduct. But the question is whether the State court must accept and recognize this national bank, never a party to any of its proceedings and unknown on its records, as its fiduciary, not as a result of judicial determination but as a result of the mandate of Congress. To recognize such a mandate in substance and effect is to approve the exercise of a judicial function by a legislative body. We understand that it has [fol. 39] always been held by the Supreme Court of the United States that the Congress is prohibited by the Constitution of the United States from exercising judicial functions. Kilbourn v. Thompson, 103 U. S. 168, 190, 191, Ocampo v. United States, 234 U. S. 91, 100. Ex Parte Grossman, 267 U. S. 87, 119, 120. Cosmopolitan Trust Co. v. Mitchell, 242 Mass. 95, 115, 116. Springer v. Government of the Philippine Islands, decided by the United States Supreme Court on May 14, 1928.

This mandate of said § 3 not only is addressed to a judicial function but it relates to a subject outside the field of Congressional legislation. It seems to us not open to debate that the general subject of the settlement of estates of

deceased persons and the appointment of fiduciaries to administer trusts is within the exclusive jurisdiction of the State. No clause of the Constitution of the United States confers any such power upon the Congress. Art. 1, § 8. That power is not forbidden to the States. Art. 1, § 10. It is a matter purely of State rather than of national cognizance. It falls among the powers reserved to the States by art. 10 of the Amendments. There is nothing contrary to this in First National Bank of Bay City v. Fellows, 244 U. S. 416, and Burnes National Bank of St. Joseph v. Duncan, 265 U. S. 17. Those decisions go no further than to hold that the Congress may require that the several States shall not discriminate against national banks in favor of State banks in the field of competitive business.

The consequence is inevitable, in our opinion, that the Congress has no power by simple legislative fiat and without provision for judicial inquiry and decision to make it imperative upon any court of this Commonwealth to recognize the present accountant, a corporation hitherto an utter stranger to its proceedings and records, as the officer and appointee of such court in a highly fiduciary capacity. We feel compelled to reach the conclusion that this clause of said § 3 (44 U. S. Sts. at Large, Part II, 1225, 1226), here under discussion, is unconstitutional.

This decision, while not required by Commonwealth-Atlantic National Bank of Boston, petitioner, 249 Mass. 440, and Commonwealth-Atlantic National Bank of Boston, petitioner, 261 Mass. 217, is in harmony with the principles on [fol. 31] which those cases rest.

We are of opinion, however, that this clause is not the dominant feature of said § 3, but is subsidiary and incidental to its main object, which is to authorize the consolidation of State banks with national banks, that this clause is separable and distinct, that the rest of the section may stand independently, and that there is no such connection between the valid and invalid parts as to support the view that the Congress would not have enacted the valid part without the other. That has been held in Worcester County National Bank of Worcester, petitioner, Adv. Sh. (1928) 1195, this day decided. It is within the principle of numerous decisions. International Text Book Co. v. Pigg, 217 U. S. 91, 113. Kellar v. Potomac Electric Power Co.

261 U. S. 428, 444. Lawton Spinning Co. v. Commonwealth, 232 Mass. 28, 32. Ashley v. Three Justices of the Superior Court, 228 Mass. 63, 81, and cases there collected. The final determination based upon all branches of this judgment is that said § 3 (44 U. S. Sts. at Large, Part II, 1225, 1226), as we have interpreted its meaning and with the clause requiring the courts of this Commonwealth to recognize the national bank as holding without new appointment the fiduciary position held by the trust company stricken down as unconstitutional, and the consolidation here in question made pursuant to the terms of said Act of Congress, are not in contravention of the law of this Commonwealth.

It is possible that the case at bar might be disposed of with the same result on the ground that, when the will of the testator was allowed and the trust company appointed executor, there was no law permitting a trust company to consolidate directly with a national bank, and that therefore the Act of Congress under which this consolidation took place, having been enacted subsequently to the appointment of the trust company as executor, cannot be operative to affect the decree of the court previously entered and the rights of the beneficiaries of the estate of the testatrix under such decree. See Wright v. Wright, 225 N. Y. 329, 336, 337. This point has not been argued. We have not con- [fol. 32] sidered it because it seems preferable to decide the case on the grounds already stated.

The result is that The Worcester County National Bank of Worcester, the accountant and petitioner in the case at bar, has not succeeded Fitchburg Bank & Trust Company as executor of the will of the testatrix and is not entitled to render an account as such executor. It can account only de son tort. The case upon this point is governed by Commonwealth Atlantic National Bank of Boston, petitioner, 261 Mass. 217. The question reported, namely, "whether the petitioner is entitled to render said account," is answered in the negative.

Probate Court instructed accordingly.

[fol. 33] In Probate Court of Worcester County

Paper #11

In re Estate of Julia A. Legnard, Worcester County National Bank of Worcester, a Corporation, Appellant

Petition for Appeal from the Final Decree of the Probate Court, Worcester, Massachusetts, Pursuant to a Rescript from the Supreme Judicial Court of the Commonwealth of Massachusetts, Assignment of Errors, and Prayer for Reversal

Petition for Appeal and Order Allowing Same

To the Honorable the First Presiding Judge of the Probate Court in and for the County of Worcester, Commonwealth of Massachusetts:

Represents the Worcester County National Bank of Worcester, a corporation organized under the laws of the United States and located in Worcester, in the County of Worcester and Commonwealth of Massachusetts, that it is aggrieved by the final decree of the Probate Court held at Worcester, in said County of Worcester, on the 14th day of June, A. D. 1928, whereby said Court, after a rescript from the Supreme Judicial Court of said Commonwealth, being the highest Court of the law or equity in said Commonwealth, and pursuant to said rescript, entered final judgment against said Worcester County National Bank of Worcester in the above-entitled cause, and it hereby gives notice that it claims an appeal from said decree to the Su-[fol. 34] preme Court of the United States, and hereby prays that its appeal be allowed and for an order fixing the amount of the bond thereon.

Assignment of Errors

The said Worcester County National Bank of Worcester, appellant, assigns the following errors in the record and proceedings in the said case, to wit:

I. That the Supreme Judicial Court of the Commonwealth of Massachusetts erred in its answer to the question

reserved by the Probate Court of Worcester County, and holding certain provisions of Section 3, Chapter 191, Acts of Congress of February 25, 1927, to be unconstitutional, and the Probate Court for the County of Worcester erred in obeying the rescript of the Supreme Judicial Court of the Commonwealth of Massachusetts and in rendering judgment in accordance therewith.

2. That the Supreme Judicial Court of the Commonwealth of Massachusetts erred in answering the reservation and report by F. H. Chamberlain, J. upon a petition for the allowance of the account in the above-entitled action in the negative, and the Probate Court for the County of Worcester erred in obeying the rescript of the Supreme Judicial Court of the Commonwealth of Massachusetts and in rendering judgment in accordance therewith.

3. That the Supreme Judicial Court of the Commonwealth of Massachusetts erred in ordering that the Register of Probate and Insolvency in the County of Worcester [fol. 35] make the following entry in the above-entitled case, to-wit:

"The question reported, namely, "Whether the petitioner is entitled to render said account," is answered in the negative. Probate Court instructed accordingly."

And the Probate Court for the County of Worcester erred in obeying the rescript of the Supreme Judicial Court of the Commonwealth of Massachusetts and in rendering judgment in accordance therewith.

4. That the Probate Court for the County of Worcester, Commonwealth of Massachusetts, erred in making the following entry in the above-entitled cause, to-wit:

"The foregoing account having been presented for allowance, after rescript from the Supreme Judicial Court (Full Court) and pursuant to the terms of said rescript, it appearing that the Worcester County National Bank of Worcester, the accountant and petitioner in this case, has not succeeded the Fitchburg Bank & Trust Company as executor of the will of said testatrix and is not entitled to render this account, this petition for the allowance of the same is hereby dismissed.

Fredk. H. Chamberlain, Judge of Probate Court."

5. That the decision in the above-entitled cause was upon the question of the validity of a statute of the United States on the ground of its being repugnant to the Constitution [fol. 36] of the United States, and the decision is against its validity.

Prayer for Reversal

For which errors the appellant, the Worcester County National Bank of Worcester, prays that the errors so complained of may be corrected and that the said judgment of the Probate Court of Worcester County, Commonwealth of Massachusetts, dated June 14, 1928, in the above-entitled cause, be reversed and a judgment rendered in favor of said appellant, and for costs.

Newton D. Baker. Newton D. Baker, Counsel for Appellant. William T. Forbes. William T. Forbes, of Counsel.

Worcester, Mass., Sept. 12, 1928.

The foregoing appeal is hereby allowed, upon the filing of bond, without surety, in the sum of One Hundred Dollars.

Fred'k H. Chamberlain, First Presiding Judge of Probate Court for Worcester County, Commonwealth of Massachusetts.

[Endorsed:] Case 88495. Supreme Court of the United States, October Term, 1928. No. —. Worcester County National Bank of Worcester, a corporation, appellant. In re estate of Julia A. Legnard. Petition for appeal from the final decree of the Probate Court, Worcester, Massachusetts, pursuant to a rescript from the Supreme Judicial Court of the Commonwealth of Massachusetts, assignment of errors, and prayer for reversal. Filed Sept. 12, 1928. Allowed Sept. 12, 1928. A true copy. Attest: Grace C. Rundlett, Asst. Register. (Seal Probate Court, Worcester, Massachusetts.)

[fols. 37 & 38] Paper #12

Bond on appeal for $100.00, approved and filed September 12, 1928, omitted in printing.

[fol. 39] In Probate Court of Worcester County

Paper #13

In re Estate of Julia A. Leonard

Appeal to Supreme Court of the United States

Waiver of Notice—Filed Sept. 12, 1928

I, Frederick H. Chamberlain, First Judge of the Probate Court, hereby waive notice of the present and all future proceedings in the above-named case.

Fredk. H. Chamberlain.

[fol. 40] In Probate Court of Worcester County

Paper #14

In re Estate of Julia A. Leonard, Worcester County National Bank of Worcester, a Corporation, Appellant

Petition for Appeal from the Final Decree of the Probate Court, Worcester, Massachusetts, Pursuant to a Rescript from the Supreme Judicial Court of the Commonwealth of Massachusetts, Assignment of Errors, and Prayer for Reversal

Waiver of Notice and Assent to Bond.

The Attorney General of the Commonwealth of Massachusetts takes notice of the above entitled Petition and Appeal and does not wish to be heard thereon, and approves of a bond of said Bank as appellant without sureties, for the sum of One Hundred Dollars ($100.00).

Joseph E. Warner, Attorney General.

A true copy. Attest: Carl E. Wahlstrom, Asst. Register. (Seal) Probate Court, Worcester, Massachusetts.

[fol. 41] In Supreme Court of the United States

Statement of Points to be Relied Upon and Designation of Parts of the Record to be Printed—Filed Sept. 25, 1928

Comes now the Appellant in the above entitled cause and adopts its Assignment of Errors as its statement of the points to be relied upon.

And the Appellant further states that only the following parts of the record as filed in this case need be printed by the Court for the hearing of the case, to wit:

Title of Paper	Paper number
Precipe for transcript of record	1
Certification of Record	2
Will of Julia A. Legnard	3
Application of Fitchburg Bank and Trust Company to approve and allow will and order of Judge of Probate Court	4
Bond of Fitchburg Bank and Trust Company, approval by judge of Probate Court and certification by James C. Andrew, Trust Officer	5
Executor's Letter	6
Application of Fitchburg Bank and Trust Company for allowance of executor's first and final account and order of Judge of Probate Court	7
Reservation and report of Probate Court	8
Rescript from Supreme Judicial Court of Massachusetts	9
Petition for appeal from the final decree of the Probate Court of Worcester County, Assignment of Errors and prayer for reversal	11
Bond of Worcester County National Bank	12
Waiver of notice of Honorable Frederick H. Chamberlain, Judge of Probate Court	13
Waiver of notice of Honorable Joseph E. Warner, Attorney General of Massachusetts	14
Opinion of Supreme Judicial Court of Mass.	10

————, Counsel for Appellant.

[fol. 42] [File endorsement omitted.]

Endorsed on cover: File No. 33,778. Massachusetts Probate Court for Worcester County. Term No. 469. Ex Parte: Worcester County National Bank of Worcester, appellant. Filed September 25th, 1928. File No. 33,778.

In the Supreme Court of the United States

October Term, 1926.

No. 468.

The First Worcester County National Bank of Worcester, a Corporation,

Appellant.

vs.

In Re Estate of Julia A. Legnard.

BRIEF OF APPELLANT.

William T. Forbes,
Counsel *for Appellant.*

Of Counsel:
Norman D. Baker.

In the Supreme Court of the United States

October Term, 1928.

No. 469.

Ex Parte Worcester County National Bank
of Worcester, a Corporation,

Appellant.

In Re Estate of Julia A. Legnard.

BRIEF OF APPELLANT.

William T. Forbes,
Counsel for Appellant.

Of Counsel:

Newton D. Baker.

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In the Supreme Court of the United States

OCTOBER TERM, 1928.

No. 469.

EX PARTE WORCESTER COUNTY NATIONAL BANK of Worcester, a Corporation,

Appellant.

In Re Estate of Julia A. Legnard.

BRIEF OF APPELLANT.

JURISDICTION.

In this case, in the court below, the validity of the statute of the United States was drawn in question and the decision was against its validity. The jurisdiction of the Supreme Court of the United States on this appeal is invoked under Section 237 (a) of the Judicial Code, 28 U. S. C. A., Chapter 9, Section 3441.

The final judgment upon which this appeal is predicated was entered in the Probate Court of Worcester County, Massachusetts, pursuant to the direction contained in a rescript from the Supreme Judicial Court of Massachusetts on June 14, 1928.

Under the provisions of the General Laws of Massachusetts of 1921, Chapter 211, a judgment entered in an inferior court of that State, pursuant to a rescript from the Supreme Judicial Court, constitutes a final decree and is not appealable. Boston, Petitioner 223, Mass. 36.

Under such State law and practice the judgment of the inferior court is by this Court regarded as a final decision of the highest court of the State in which a decision could be had and the writ of error to or appeal from such decision is properly directed to the inferior court. *Davis v. Cohen*, 268 U. S. 638; *Meyers v. International Trust Company*, 273 U. S. 380; *Hess v. Paulaski*, 274 U. S. 352. For a further discussion of the jurisdiction the appellant respectfully relies upon the statement filed in its behalf under the first paragraph of Rule 12.

REPORT OF THE CASE IN THE COURT BELOW.

The opinion of the Supreme Judicial Court of Massachusetts in this cause has not yet appeared in the official volumes of the Reports of that Court, but the opinion was delivered on the 30th day of May, 1928, and appears in full in 162 N. E. 217. It is also printed in the Transcript of the Record in this case at page 15.

THE QUESTION INVOLVED IN THE CASE.

The question here involved is the constitutionality of a provision contained in the Act of Congress of February 25, 1927, relating to the consolidation of state banks and trust companies with national banks, and defining the succession of the consolidated bank to the fiduciary powers of its constituents.

The statute in question, part of the so-called McFadden Bill, passed February 25, 1927, *Chapter 191, Section 1, 44 Stat. 1225*, and appearing as *12 U. S. C. A., Chapter 2, Section 34a*, follows, with the important clauses in italics and with immaterial portions omitted as indicated by asterisks:

> "Consolidation of state bank, etc., with national bank; capital stock; dissenting shareholders. *Any bank incorporated under the laws of any State, or any bank incorporated in the District of Columbia, may be con-*

solidated with a national banking association located in the same county, city, town, or village under the charter of such national banking association on such terms and conditions as may be lawfully agreed upon by a majority of the board of directors of each association or bank proposing to consolidate, and which agreement shall be ratified and confirmed by the affirmative vote of the shareholders * * *. The capital stock of such consolidated association shall not be less than that required under existing law for the organization of a national banking association in the place in which such consolidated association is located; *and all the rights, franchises, and interests of such State or District bank so consolidated with a national banking association in and to every species of property, real, personal, and mixed, and choses in action thereto belonging, shall be deemed to be transferred to and vested in such national banking association into which it is consolidated without any deed or other transfer, and the said consolidated national banking association shall hold and enjoy the same and all rights of property, franchises, and interest including the right of succession as trustee, executor, or in any other fiduciary capacity in the same manner and to the same extent as was held and enjoyed by such State or District bank so consolidated with such national banking association.* When such consolidation shall have been effected and approved by the comptroller * * *. No such consolidation shall be in contravention of the law of the State under which such bank is incorporated.

"*The words 'State bank,' 'State banks,' 'bank,' or 'banks,' as used in this section, shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws.*"

On the 27th day of June, 1927, the Comptroller of the Currency issued a certificate approving the consolidation of the Merchants National Bank of Worcester, Massachusetts, a national bank, and the Fitchburg Bank and Trust

Company, a corporation organized under the laws of Massachusetts and doing business at Fitchburg in the County of Worcester. The consolidated bank bears the name of neither of its constituents, but its corporate title is Worcester County National Bank of Worcester.

Prior to this consolidation, on April 21, 1926, the Fitchburg Bank and Trust Company was appointed executor of the will of Julia A. Legnard by the Probate Court of Worcester County, Massachusetts. (R. 57). The probate was allowed on the 21st day of April, 1926. The will contains the following provision, (R. 3):

> "* * * and I nominate, constitute and appoint said Fitchburg Bank and Trust Company sole executor of this my will and request that it be not required to furnish a security or securities on its official bond as such executor."

After the consolidation, on the 11th day of February, 1928, Worcester County National Bank of Worcester attempted to file the first and final account of the Fitchburg Bank and Trust Company, as executor, covering the period between the 21st day of April, 1926, and the 9th day of February, 1928. (R. 8). The account shows that it is rendered by the Worcester County National Bank of Worcester for said Fitchburg Bank and Trust Company to June 27, 1927, and thereafter as its own account. This account further recites the consolidation above described.

The probate judge made an entry as follows:

> "I find that this account is in proper form for allowance and should be allowed as rendered if the said Worcester County National Bank, as successor, or otherwise, is executor of said will, or has the right to render said account under the laws of the United States." (R. 12).

He further found that the action required by Federal statutes to be taken by the Comptroller of the Currency

and Federal Reserve Board had been duly taken, and stated the following situation:

> "There are many estates now being administered in this County by this accountant, the Worcester County National Bank of Worcester, under a claim of right by virtue of said Acts of Congress, where the Fitchburg Bank and Trust Company was appointed administrator, executor, trustee, or in some other fiduciary capacity prior to the consolidation, and where no new appointment of said Worcester County National Bank of Worcester in place of, or as successor to said Fitchburg Bank and Trust Company has been made by decree of this court.
>
> "Without action upon said account, I report the above facts and the question of law involved, for the consideration and determination of the Full Court, as to whether the petitioner is entitled to render said account." (R. 13).

Thereafter on the 24th day of May, 1928, the Supreme Judicial Court of Massachusetts ordered that the register of probate and insolvency in the County of Worcester make the following entry in said cause in the docket of said court, viz:

> "The question reported, namely, 'whether the petitioner is entitled to render said account,' is answered in the negative. Probate Court instructed accordingly." (R. 30).

Upon the receipt of this answer and instruction, the Probate Court of Worcester County on the 14th day of June, 1928, entered upon its docket the following:

> "The foregoing account having been presented for allowance after rescript, etc., it appearing that the Worcester County National Bank of Worcester, the accountant and petitioner in this case, has not succeeded the Fitchburg Bank as executor of the will of said testatrix and is not entitled to render this account, this petition for the allowance of same is hereby dismissed." (R. 10).

From this judgment of the Probate Court of Worcester County on rescript from the Supreme Judicial Court of Massachusetts, this appeal was perfected.

THE GROUNDS OF THE JUDGMENT BELOW.

It is clear from the foregoing that the judgment complained of denies to the Worcester County National Bank *the right of succession, as executor, to the Fitchburg Bank and Trust Company.* An examination of the opinion of the Supreme Judicial Court of Massachusetts discloses that the controlling conclusions of that court were:

1. That the consolidation of the Worcester County National Bank and the Fitchburg Bank and Trust Company was not in contravention of State law.

2. That *12 U. S. C. A., Chapter 2, Sec. 34a* provided for the succession of the Worcester County National Bank as executor by operation of law and without any action by the Probate Court.

3. That to the extent that *12 U. S. C. A., Chapter 2, Sec. 34a* provides for the succession of Worcester County National Bank as executor by operation of law, the statute is in contravention of the laws of Massachusetts in that it violates Part 1 of Article 30 of the Massachusetts Bill of Rights, which prohibits the Legislative Department from exercising judicial power.

4. That to the extent that *12 U. S. C. A., Chap. 2, Sec. 34a* provides for the succession of a consolidated National Banking Association as executor by operation of law, it is unconstitutional and void:

(a) Because it constitutes an exercise of judicial power by the legislative department of the Federal Government in contravention of the Constitution of the United States.

(b) Because the statute to this extent deals with a subject over which no jurisdiction has been delegated to the Federal Government by the Constitution of the United States, but which has been wholly reserved to the states by Article 1, Section 10, and by the Tenth Amendment of the Constitution of the United States.

5. That the clause of *12 U. S. C. A., Chapter 2, Section 34a* which provides for the succession of consolidated National Banking Associations as executor, by operation of law, is so far separable that the unconstitutionality of said clause does not render the rest of the statute void.

I.

THE PRELIMINARY CONDITION IMPOSED BY 12 U. S. C. A. CHAPTER 2, SECTION 34A UPON CONSOLIDATIONS.

The clause of *12 U. S. C. A., Chapter 2, Sec. 34a* which provides that "no such consolidation shall be in contravention of the law of the state under which such bank is incorporated" merely defines the conditions upon which the statute shall apply or become operative in a particular state but in no wise limits its effect wherever it is applicable and operative at all.

By this statute Congress created authority for the consolidation of state banks and trust companies with national banks and defined the effects of such consolidation and the powers of the consolidated corporation. It then proceeded to prescribe that the authority thus granted by Congress should not be effective or applicable in any state where such consolidations would be in contravention of the state law. This was a condition precedent to the exercise of the power granted by Congress, but it was in no sense a limitation or modification of the power granted where the condition precedent to its exercise existed. The condition precedent was determinative of whether the con-

solidations should take place at all but not of what should be the effect of the consolidation or the powers of the consolidated corporation. That is, if the consolidation of such institutions were in contravention of the state law, it was not to take place at all under the authority of Congress; but where such consolidation was not in contravention of state law, the effect of the consolidation and the powers of the consolidated corporation were to be whatever Congress said in the statute.

Hence, the only question which was open to the Court below in such a case was: Is the consolidation of banking corporations and trust companies prohibited by or in contravention of the law of Massachusetts? The initial question presented is as to the applicability of the statute and not as to its constitutionality. When this initial question has been answered in the affirmative, the Court has no power to determine that the statute is inapplicable because in the opinion of the Court the statutory effect of the consolidation and the powers of the consolidated corporation may be in some particulars in contravention of state law. Congress prescribes the powers of corporations, created by it, whether by consolidation or by original creation. If the constitutional authority to consolidate is to be exercised at all, it is beyond the power of the Court to prescribe a different effect than has been laid down by Congress. It is easy to see that this must be so. Were it otherwise, national banks created by Congress to serve high public purposes would, by the absorption of state institutions, subject themselves to control by state legislatures and their powers would thereafter vary in the several states as the legislatures of the states from time to time changed their local policy.

In the instant case, the Supreme Judicial Court of Massachusetts has affirmatively determined that the consolidation is not in contravention of the law of Massachu-

setts. With the determination of the initial question in the affirmative, the sole remaining question for the consideration of the Court was whether the statute, being applicable and operative according to its terms, was within the constitutional power of Congress to enact. While the Supreme Judicial Court undertakes to determine that one of the statutory effects of the consolidation was in contravention of the laws of Massachusetts, the Court seems to recognize the immateriality of its conclusion by proceeding to pass upon the constitutionality of the Act according to its terms, which would be wholly unnecessary if the Act were inapplicable according to its terms. Since the Court has found that the consolidation is not in contravention of state law, the Act is effective according to its terms unless it is unconstitutional; and that is the question here presented for determination by this Court.

IMPORTANCE OF THE QUESTION.

If the statement of the question to be decided fails to suggest its importance and the far reaching consequences which hang upon its decision, the following observations will show that in fact the whole future of the national banking system of the United States and of the Federal Reserve System may be at stake. An important, even essential, branch of modern banking is the management of Trust Estates and the execution of fiduciary relationships of one sort and another. All the great banks of the country are either at the same time trust companies, or have subsidiary or affiliated corporations doing trust company business. Countless wills and powers are in existence designating by name trust companies as executors and donees, and every important trust company in the country is executor, administrator, trustee, or fiduciary in a great volume of current business. Clearly, the normal changes in official personnel, capital structure, and other characteristics of these

trust companies, do not, as they occur, automatically terminate the trust relationship. The only practicable rule in such matters has been followed by the courts and is established as the law, namely; that when a trust company is designated to act as a fiduciary an intention is attributed to the person or court making the selection that the relationship shall continue through all such changes unless the act of appointment itself specifically limits the duration of the appointment to the time during which no such changes take place in the Trust Company. Otherwise stated, changes allowed by law in Trust Companies, as corporations, are deemed to have been in contemplation at the time of the appointment, and the appointment is unaffected by them when they occur. Were the law otherwise, no Trust Company could safely permit any change of any kind in its structure and the accidents of death and resignation in its official personnel would both destroy the business of the company and confuse the administration of vast property interests. The right of the court or other creator of a trust to examine, from time to time, the character of the trustee, and to remove and replace a trustee whose character or characteristics have so far changed that they no longer satisfy the court's opinion as to the needs of the trust is, of course, unquestioned. This power applies as much to individual trustees as to the corporate trustees. A man appointed executor and subsequently becoming blind or mentally enfeebled may be removed by the court if his disqualification is prejudicial to the trust; but neither blindness nor mental enfeeblement automatically terminates the relationship, and so with regard to corporate trustees. They may be so changed as to lead a court to prefer, in the interests of the estate, either larger security or more highly specialized attention; but in the case of corporate trustees, as in the case of individuals, the termination of the relationship is not automatic.

Considerations of this kind have been freely applied in the state courts to state corporations; and laws authorizing consolidations of State Banks and Trust Companies, with large changes in their powers, have been held not to affect existing trusteeships, or to prevent the assumption of power as executor under wills executed previous to the consolidation and designating, by name, an institution absorbed in the consolidation with an accompanying loss of nominal identity.

The Act of Congress under consideration has followed and adopted this uniform state practice, and in order to preserve National Banks, has authorized them to consolidate with and absorb Trust Companies, with a like preservation of all the powers, rights and duties of the constituents. If it should be held that Congress may not so provide for succession by National Banks to the fiduciary duties of State Banks and Trust Companies absorbed by them, it is plain that the absorptions and consolidations will all be the other way. National banks will allow themselves to be absorbed by State banks, and there will disappear from the national system its most important members, if not, ultimately, its entire membership. The effect of this is not merely an abstract and academic defeat of a congressional policy, but the very practical destruction of the Federal Reserve System through which, since 1913, the government has regulated the issuance and supply of currency, the use of bank credit, and the development of acceptances as an aid to the promotion of the nation's international trade.

The Federal Reserve System has been before this Court a number of times; and the Federal Reserve Act and its amendment have been considered by the Court, some of the cases illustrating attempts by state legislation or otherwise to build up state banking systems as against a growing national system. *Farmers & Merchants National Bank of Monroe v. Federal Reserve Bank of Richmond*, 262

U. S. 649; *American Bank & Trust Co. v. Federal Reserve Bank*, 262 U. S. 643. This Court is, therefore, fully advised, both of the gradual development of the federal plan and of the efforts of the states to stay, if not defeat, its growth. Nor is it strange that there should be this conflict. The virtue of the Federal Reserve plan lies in the fact that it requires accumulation by member banks of real reserves, based upon the extent of their deposit liabilities. While a very large source of profit to banks under the state systems now, and under the federal system prior to the Federal Reserve Act, lay in the accumulation of mere paper reserves, thus freeing for speculative employment funds of the banks which now are required, in the case of member banks, to be segregated and kept in gold or its substantial equivalent. The vice of the banking system prior to the creation of the Federal Reserve System lay in the fact that when bank reserves came suddenly to be needed, they were found to be unobtainable, and pressure brought by the banks to recover possession of their reserves in times of stringency caused, year after year, panics and financial crises of increasing severity and destructiveness.

In this case, as in all others, security can be obtained only by some sacrifice. Congress measured the quantity of security needed by national interests and imposed the corresponding sacrifice on the member banks of the Federal Reserve System. So far as the matters of currency and bank credit are concerned, the country has been, since 1913, safe from panic; and if the Federal Reserve System can be preserved as substantially dominant in the money market, this element of the national security will be safe. If, on the other hand, there be a gradual draining away of member banks from the Federal Reserve System, national control over credit and currency will disappear, and there will gradually be built up, around and outside of the national financial structure, a larger and more powerful set

of financial agencies, which through the absence of safeguards imposed in the national interests will constantly imperil the national welfare. The tendency in this direction is already striking, if not alarming. Not only through the defection of member banks from the Federal Reserve System, but from the building up of private and corporate financial agencies outside of all banking control, which supply funds or withdraw funds from the money market, in complete irresponsibility to any control in the public interest, and it may not be fanciful to forecast a time when, in the interest of having any safety in a national financial scheme it may be necessary for Congress to take fresh and more drastic steps. For the present, however, we are concerned only with the maintenance of the agencies which Congress has established and the protection of those agencies from impairment at the hands of states, either through the offering of superior attractions in the way of liberalities of charter, or of the denial of powers to these federal agencies which Congress has deemed necessary for their effective operation.

The Federal Reserve System, under the *Act of December 23, 1913, 38 Statutes, 251*, proceeds upon the organization in Federal Reserve Districts, which geographically cover the entire country, of Federal Reserve Banks, each bank being composed of member banks, and each Federal Reserve Bank operating in its own district under the general co-ordinating control of the Federal Reserve Board, a part of the official fiscal apparatus of the nation sitting in Washington.

The Federal Reserve Banks are organized by requiring each national banking association within its district to subscribe to their capital stock a sum in proportion to its own paid up capital and surplus. The backbone of the Federal Reserve System, therefore, is the National Bank. State Banks are invited to become members of the Federal Re-

serve Banks on certain terms, and affiliations of non-member State Banks are authorized in order to spread the advantages of facilities which Federal Reserve Banks afford. But there is complete in-and-out elasticity of membership for State institutions in the Federal Reserve System. Its permanent roster of members consists of National Banks. If, therefore, the number or relative importance of National Banks in the country decreases, the Federal Reserve Banks correspondingly decrease in their influence and power in the general financial situation. If it be within the power, either legislative or judicial, of the states either to entice away National Banks by offering them charter advantages which Congress cannot extend, or to deny to National Banks, operating in the several states, advantages, the absence of which cripple them in their competition with state institutions, then the gradual disintegration of the Federal Reserve System, and the consequent destruction of the national plan is inevitable. The case is hard enough for the national plan at best. The state institutions are subjected to varying degrees of supervision, and reserve and other requirements imposed upon them vary from time to time as state legislatures may be moved. Any national plan must of necessity be more rigid in its requirements if the national plan serves national rather than local purposes. It supplies the national fiscal agency and controls the currency and credit situations which are nation-wide.

With this inescapable handicap, of greater conservatism and more drastic safeguard, the National System will, of course, find itself most popular in times of stress, and most subject to impatient criticism when fair financial breezes are blowing. This handicap the National System has been able to meet. But if it be held that National Banks, upon consolidation with state institutions, lose the fiduciary identity and business of the constituent state institutions which they absorb, if the absorption is national-wise, while

all those rich opportunities for business are preserved if the absorption is state-wise, it is clear that the National Banking System will be struck a mortal blow.*

II.

CLAUSE OF 12 U. S. C. A., CHAPTER 2, SECTION 34A, WHICH PROVIDES FOR THE SUCCESSION OF CONSOLIDATED NATIONAL BANKING ASSOCIATION AS EXECUTOR BY OPERATION OF LAW IS WITHIN THE CONSTITUTIONAL POWER OF THE CONGRESS.

A.

The legislative history of this Act conclusively demonstrates that the purpose was within the scope of the Constitution.

Section 34a, 12 U. S. C. A., Chapter 2, forms a part of the Act entitled "An Act to Further Amend the National Banking Laws and the Federal Reserve Act and for other purposes," approved February 25, 1927 (44 Statutes 1225). This Act was adopted pursuant to urgent recommendations by the Comptroller of the Currency in his Annual Reports to the Congress for the years 1924, 1925 and 1926. In his Report for 1925, the Comptroller of the Currency after reviewing the defections of National Banks to the State Systems, said at page 4:

> "These facts present a serious situation for the consideration of the Congress and I am directing your

*Note: The records of the Comptroller's office show that during the period from November 1, 1923, to the close of business on January 15, 1929, there were 467 National Banks merged or absorbed by State Banks and Trust Companies. 179 of the State Banks thus consolidating had trust powers under the statutes of the states of their creation. As to the remaining 288 State Banks the records fail to disclose what the fact was with regard to trust power. The Comptroller's records further show that the total capital, not including surplus, undivided profits, or other assets of the National Banks which went out of the National and into the State System in this manner, was $112,278,300. Of this amount, 35 National Banks had a capital of $1,000,000 or over; 169 Banks had a capital between $100,000 and $1,000,000, and 263 of these National Banks had a capital of less than $100,000.

attention thereto at this time chiefly for the purpose of showing that the adverse conditions of national bank operations, as to which my predecessor so urgently recommended remedial legislation, are becoming daily accentuated. The national banking system is a time-honored Federal instrumentality. The charter powers of the individual national banks are derived solely from the Congress. Twice in the history of the United States, namely, immediately after the Civil War and immediately preceding the World War, the Federal Government was able to enforce a banking policy at the time of great financial stress through its authority to use the national banking system as an instrument for the public benefit. The individual national bank is always ultimately able to take care of itself in meeting the competitive conditions due to more favorable State laws by giving up its national charter and going into the State System. But the gradual loss of national banks and the consequent decrease in relative resources of the national banking system are of primary concern to the National Government, not only because the national banks form the logical and permanent basis of the Federal Reserve System but also because only through the national banking system can there be maintained throughout the United States a standardized system of banking subject to the visitorial powers of the Federal Government and subservient at all times to the will of the Congress."

In his Report for 1926, the Comptroller, after reviewing the disadvantages under which the National banks were operating as compared with the State banks and the consequent temptation to them to operate under State charters, said at page 3:

"The national banking system should be adequate to meet all of the requirements for modern business and no national bank ought to be put in the position of being forced to yield its charter in order to carry on legitimate and necessary banking operations."

In his Report for 1927, the Comptroller summarized the methods by which the recommendations for the amendments contained in the Act of February 25, 1927, (44 Statutes 1225) were arrived at, and said, at page 2:

> "In the Comptroller's report for 1924 there was laid before Congress convincing evidence of the urgent need for the broadening of the charter powers of the national banks, as provided by the bill, in order to save the national banking system from ultimate extinction. That report showed that the national banks were gradually declining in relative strength, having during the preceding six years lost more than $2,230,000,000 to the State systems.
>
> "Subsequent developments during the three years the bill was before Congress served only to emphasize the trend toward disintegration in the national banking system. In my report to Congress for the year 1926 I pointed out that during the three year period ending with September, 1926, 253 national banks entered the State systems, taking with them aggregate resources of more than $1,000,000,000. The aggregate resources of the national banks had dropped from 75 per cent of the total of commercial banking resources in the United States in 1884 to about 46 per cent in 1926."

On April 26, 1924, the House Committee on Banking and Currency in its report recommending the passage of this Act said:

> "The national banking system is facing an emergency which affects its very existence and ultimately the existence of the Federal Reserve System. This situation is due to the fact that the national banks, operating under the law of 1864 with amendments, lack the necessary charter powers to give the most complete modern banking service. They are dependent solely upon Congress for these grants of power. Two kinds of legislation is urgently needed at this time—the one to permit national banks effectively to carry on the banking business and *the other to protect them in so*

far as Congress can do so from the inroads of competition from State member banks of the Federal Reserve system which are operating under charter powers granted by the State legislature.

"This bill is designed to meet this emergency by amending the national banking laws in several important particulars for the purpose of meeting the outstanding need of the national banks for more modern charter powers and by putting certain restraints on branch banking by State member banks in the Federal reserve system. The legislation here recommended would permit national banks to have more freedom in carrying on the banking business. The enlarged powers granted in this bill are along conservative lines and nothing is permitted which has not already been demonstrated to be sound banking." (House Report No. 583, 68th Congress, 1st Session, pp. 1 and 2).

And further:

"The enactment of this bill into law will put new life into the national banking system. The cumulative effect of its provisions will produce a situation in the Federal reserve system where the rights of the national banks will be more nearly on a par with those of the State member banks. When the Federal reserve act was amended to let State banks come into the Federal reserve system with their full charter powers, the national banks, operating under the old national bank act of 1864, found themselves, as compulsory members of the Federal Reserve System, placed at a considerable disadvantage. Many of these State banks are operating under modern banking codes. The amendments which had heretofore been made to the national bank act were not sufficient to enable the national banks to compete on terms of equality with such State member banks while at the same time they were compelled by law to bear the chief burden in supporting the Federal reserve system. * * *

"Your committee feels that this measure is of the greatest importance to the stability of our banking system and respectfully urge its early passage." (House Report No. 583, 68th Congress, 1st Session, pp. 4, 5.)

On May 31, 1924, the Senate Committee on Banking and Currency submitted a report upon the same bill which contains substantially identical recommendations for its passage. (See Senate Report No. 666, 68th Congress, 1st Session, pp. 1-2 and 7-8).

The bill having failed of passage in the 68th Congress, the House Committee on Banking and Currency submitted its report on the bill on January 12, 1926. The House Committee restated the purposes and necessity of the Act in substantially the same language as had been employed in the Reports of House and Senate Committees on the bill in the 68th Congress, but added "that the need for this legislation is even more urgent than it was during the last Congress and respectfully" urged its passage. (House Report No. 83, 69th Congress, 1st Session, pp. 6-7).

The Act, as finally approved, contains some twenty amendments to the National Banking Laws which were designed as a whole, to improve the charter powers and operating conditions of the national banks. The particular provision in question forms a part of an amendment to the Act of November 7, 1918 (which provided for consolidation of National banks), and provides for the consolidation of a State bank with a National bank under the national charter.

The history of this legislation shows that the congressional purpose was to preserve and render more secure the national banking system as an instrumentality of the Federal Government. Congress was confronted with a situation where the national banking system was declining, not only in its relative importance in the banking system of the nation, but absolutely, in the sense that its losses were exceeding its accretions. The Comptroller in his Report for 1926, p. 2, says:

"Last year I directed your attention to the fact that for the period from October 21, 1923, to October 17, 1925, 166 national banks left the national system to engage in the banking business under State charter, carrying with them aggregate resources of $566,600,000. It is with regret that I must now report that from October 17, 1925, to October 1, 1926, 87 national banks went into the State systems with aggregate resources of about $560,000,000. During the same period 29 State banks nationalized with aggregate resources of about $235,000,000."

See also Comptroller's Report for 1925, p. 3.

Congress recognized that this was a period of consolidation of financial institutions to enable them to meet the enlarged and constantly growing demands of trade and commerce. Competing State institutions were permitted to consolidate under the laws of the various states. The State laws permitted the consolidation of national banking associations with State banks under liberal State charters; and as a result the Federal Government was losing its instrumentalities. It was clear that if the Federal Government was not to lose its instrumentalities through such consolidations it must place them on a parity with State institutions with respect to such powers of consolidation. This could only be done by preserving all the rights and privileges of component State and National banks upon consolidation under Federal charter. There was thus involved not only the question of conferring upon the national banks appropriate and relevant private functions which Congress deemed essential or proper for the successful operation of national banks but there was also involved the necessity that Congress endow national banks with those powers, by way of consolidation, which would enable them to meet the competition through consolidation which had been created by the States.

But there is more involved here than the mere question of competition between individual national banks and individual State banks and trust companies. There is involved the larger question of competition between the Federal Government and the several States for the privilege of chartering and supervising banks. This is obvious when we consider the practical situation which led to the enactment by Congress of the provision here under consideration. This is an era of bank consolidations, and the tendency is strongly towards the creation of fewer and larger banks. In order to provide large banking institutions equipped to transact a banking business in all of its phases coupled with the business of a trust company, bankers are consolidating many national banks with State trust companies; and this is especially true with regard to the largest and most important banks. Whenever the directors of a national bank and a trust company meet together to decide upon a consolidation, the question arises whether the consolidated bank shall have a national charter or a State charter. The trust company nearly always has a large amount of trust business; it is usually handling many matters under the supervision of the probate courts as executor, administrator, trustee and guardian; is acting under private trust instruments as trustee, registrar and transfer agent; and has in its vaults many ambulatory wills naming it as executor, guardian and trustee. If there is any doubt about the right of the consolidated bank to continue to transact all of this business under a national charter, therefore, the directors will decide to effect the consolidation under a State charter; and the National Banking System will lose through these consolidations many of its largest and most important members. Stated differently, the Federal Government will lose many of the largest and most useful of the Federal instrumentalities created under the National Bank Act for the performance of its fiscal functions. Con-

gress fully appreciated this situation; and, in order to preserve the existence of the National Banking System, enacted this legislation so that persons about to consolidate a National bank with a State trust company would feel that they could safely retain the national charter without losing the trust business formerly held by the trust company.

Hence, the legitimate congressional purpose of preserving the Federal fiscal instrumentalities involved both the enlargement of the corporate powers of national banks to meet modern banking conditions and the creation of authority for the consolidation of State banks with national banks, under Federal charter, upon conditions which would preserve, in the consolidated national bank, all of the powers, rights and privileges held by the State institution, to the end that the Federal instrumentalities might be sustained as against the competition created by the States through the authorization of the consolidation of State banks on favorable terms.

B.

The extent of the power of Congress to create National Banks and endow them with private functions.

The principles here involved have been long established and are no longer open to debate.

First. Since *McCullouch v. Maryland*, 4 Wheat. 316, and *Osborne v. Bank*, 9 Wheat. 738, the power of Congress to create national banks as fiscal agencies of the Federal Government and to endow them with such private functions as in the judgment of Congress are relevant and appropriate to the banking business and which in the judgment of Congress are necessary or convenient to make the business of national banks successful, has never been doubted. *First National Bank v. Fellows*, 244 U. S. 416. Since

trust powers have been quite universally conferred upon state corporations which carry on businesses that are essentially of a banking nature, it is not open to argument but that such powers are so far relevant and appropriate to the successful operation of the banking business that Congress may in the exercise of its legislative discretion attach such powers to national banks for the purpose of insuring their successful operation.

Second. It is equally well established that although certain businesses or functions are of such a character that they are not inherently relevant or appropriate to the banking business so as to come within the foregoing rule, Congress nevertheless has the power to authorize national banks to carry on such business or to discharge such functions, wherever State laws authorize corporations which are rivals or quasi rivals of national banks to do so, in order to protect the national agency against actual or potential competition created by the State. *First National Bank v. Fellows*, 244 U. S. 416, 425-426.

Third. To the extent that Congress has power to endow national banks with functions of a private nature in order to secure their successful operation or to protect them from state competition under the foregoing rules, that power is paramount over the power of the State and deprives the State of the right to defeat or nullify the congressional action, directly or indirectly, through the exercise of the State power to regulate such private business, or through the exercise of the State power to control its courts. *First National Bank v. Fellows*, 244 U. S. 416 at 425; *Burnes National Bank v. Duncan*, 265 U. S. 17 at 24; *Fidelity National Bank & Trust Co. v. Enright*, 264 Fed. Rep. 236.

If there is to be any competition between the nation and the states, Congress has the last word. The business

of banking necessarily affects national interests and the national welfare, and nothing can stand in the way of national legislation reasonably adapted to the preservation of the dominant national interest. If the necessities of the situation justified it, Congress would have power to require all banks to take out national charters and thus to bring the whole business of banking under national control. *Veazie Bank v. Fenno*, 8 Wall. 533. As yet no such necessity has arisen; Congress has felt itself able to meet state competition by successive enlargements of the powers of national banks. As a lesser exercise of the same power Congress would have the power to provide generally that the national banks should have in each state, in addition to the powers specifically in national charters, all the powers given in that state to state banks. The inconvenience of such legislation is clear since it would subject the national banks in a state to variation in the local legislative policy, but the power of Congress to do this could hardly be open to dispute. In the presence of these large and plenary powers in Congress, it seems clear that the power exerted in the present Act is wholly within the competence of Congress.

C.

The power of Congress to create Federal fiscal agencies and endow them with relevant and appropriate functions, or to protect them against State created competition, by transmutation is as plenary as the Congressional power to create such instrumentalities by initial organization.

In *Casey v. Galli*, 94 U. S. 673 at 678, the court in discussing the plea that a national banking corporation which had been created by conversion of a State bank pursuant to Federal statute had no existence because there was no authority under State law for the conversion, said:

"The second plea is clearly bad. No authority from the State was necessary to enable the bank so to change its organization. The option to do that was given by the forty-fourth section of the Banking Act of Congress. (13 Stat. 112). The power there conferred was ample, and its validity cannot be doubted. The act is silent as to any assent or permission by the State. *It was as competent for Congress to authorize the transmutation as to create such institutions originally.*"

Since Congress has the power to create such agencies by transmutation, as well as by initial organization, it has the power to make the transmutation or consolidation effective by such means as in its discretion seem best. It is not permissible to isolate any particular attribute or incident of the consolidation for the purpose of determining whether Congress would have the power to create such an attribute or incident or deal with the subject thereof as an isolated matter, but the power of congress to attach such attribute or incident to the consolidation must be tested by considering the consolidation as an entirety and the power of Congress to authorize the consolidation. *First National Bank v. Fellows, supra.*

The means here employed by Congress, to make effective its power of creation by transmutation, were well within the scope of constitutional power. Such means are sustained both by the power of Congress to attach private functions which are relevant and appropriate to the banking business and by its power to attach still other private functions where necessary to meet competition. Massachusetts Trust Companies were permitted to consolidate or merge. *Massachusetts General Laws, Chap.* 172, Sec. 44.

As before pointed out, it was and is a period of consolidation of financial institutions to enable such institutions to meet the enlarged and constantly increasing de-

mands of trade and commerce. The tendency of people to transact all of their business with an institution which is able both through size and the extent of its powers to take care of all of their financial requirements has become pronounced. National banks were surrendering their Federal charters and consolidating with State institutions under State charters. Congress could only preserve and sustain the national instrumentalities by authorizing them to consolidate with State institutions under Federal charters in the same way and by preserving as an incident of such consolidation all of the rights, powers and privileges which were enjoyed by the absorbed State institution. Clearly, the transfer by operation of law of all such powers and privileges held and exercised by the State institution consolidated with the National Bank, could not be in contravention of State law because by the terms of the statute, the only powers, privileges and rights which were so transferred to the consolidated national corporation as an incident of the consolidation, were those which had been created by the State and were existing in the State corporation. This power of Congress to make effective and render practically available this power of creation by transmutation or consolidation is not, as has been shown, subject to indirect nullification by the power of the State to regulate the subject matter of the incidents of the consolidation or by the power of the State over its courts.

However, if the decision of the Massachusetts court be sustained, this power of Congress is indirectly but effectively defeated and nullified. Since the power of Congress to enact this legislation rests both upon its power to attach relevant and appropriate functions to national banks and to endow them with powers necessary to meet competition created by the State, it is clear that Congress is a *competent legislature* to act upon the subject matter to the extent and within the purview of this statute, and that the

legislation is within the scope of the Constitution. Hence, if this legislation is unconstitutional, it cannot be because it is not within the scope of congressional power, but must rest upon the contention that it violates some restrictive provision of the Federal Constitution. The only question which remains is whether a competent Legislature may provide such an incident of corporate consolidation.

D.

Congress may constitutionally provide for succession by a consolidated corporation, as an incident of the consolidation, to all rights as Trustee, Executor or Administrator which were held by the constituent or absorbed corporations.

The Supreme Judicial Court of Massachusetts does not contend that it would be beyond the power of a Legislature to prescribe, generally, the incidents or effect of the consolidation or merger of corporations which were created or authorized by that Legislature. Since it has been demonstrated that the Congress is a competent Legislature in this case, no further argument seems necessary. However, the constitutionality of such a power extending to fiduciary relationships is well established by authority.

In *Iowa Light H. & P. Co. v. The First National Bank of Boston*, 250 Mass. 353, 145 N. E. 433, the original Trustee under a trust mortgage (a Massachusetts Trust Company) had been converted into a national bank and then merged and consolidated with the defendant national bank. The court held that the defendant national bank "succeeded to all the rights, title and powers of the International Trust Company, and is the Trustee for the bondholders."

A similar result was reached in *Mercantile Trust Co. v. San Joaquin Agricultural Corp.*, 265 Pac 583, where the court said at page 588:

"It is true that each of the consolidated banking corporations, as a distinct, independent, and separate corporate entity, practically passes out of existence or becomes extinct upon the completion of the act of consolidation. But, unlike in cases of dissolution, their corporate activities do not cease but are continued and are prosecuted and carried on through a new channel—a channel created solely by their own voluntary act under the sanction of the law for that specific purpose. Speaking figuratively, the act of consolidation is merely the joint transfusing of the blood of the constituent corporations into the veins and arteries of a new single corporate entity, that they may enlarge and extend the scope and business ramifications of their own corporate purposes and also to impart enhanced solidity to their responsibility as banking and trust corporations."

At page 589:

"All corporations, as has also been stated, are organized with full knowledge by the people of all the laws governing the formation of corporations and the exercise of their rights and obligations thereunder, and therefore, in such an instance as we have here, the statute authorizing the consolidation or merger of banking corporations, insofar as it prescribed a scheme for the transfer of their properties, rights, agreements, obligations, duties, etc., to the consolidated corporation, enters into and becomes a part of every agreement or obligation entered into or assumed by the constituent corporations prior to the consolidation, and of this the defendant, its directors and bondholders are presumed to have known before and at the time of the execution of the trust deed. Indeed, in appointing the Savings Union Bank & Trust Company the trustee of the trust, the defendant and its officers and the holders of the bonds secured by said deed to or mortgage upon the lands therein described are to be held to have impliedly assented to the exercise of the legal right of said bank to merge into or consolidate with another banking corporation, with all

the consequences following such merger or consolidation as are prescribed by the law."

In *McElwain v. Primavera*, 167 N. Y. S. 815, the court in discussing the effect of consolidation of State banks under the New York Banking Laws, said:

> "'Dealing with the original banking corporation, the defendant subjected himself to the possibility of merger and the enforcement of the contract by the new corporation, which is new, so far as the defendant is concerned, in name only.' (*Bank of L. I. v. Young*, 101 App. Div. 88, 91 N. Y. S. 849).
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> "The provisions of Section 37 of the Banking law, quoted above, regulating the transfer and the vesting of property in a case where merger occurs, are very broad. The Legislature did not contemplate that the property of one bank merged in another should vest in the corporation in which the merger takes place by operation of any assignment, or that such transfer should be attended with the usual rules of law in respect to assignments. The scheme is that the corporation which is merged with another should *lose its identity only so far as its separate existence is concerned*, and that it should be swallowed up in the other and become an integral part thereof, carrying into the corporation which survived all its rights, powers, liabilities and assets, except the indicia and attributes of a corporate body distinct from that into which it is merged."

In *Chicago Title & Trust Co. v. Zinser*, 264 Ill. 31, 105 N. E. 718, the court held that it was competent for a Legislature to prescribe that as an incident of the consolidation or merger of trust corporations, the consolidated corporation succeeded to the right to be executor under unproved wills in which the absorbed trust company had been named as executor.

> "The material question here is whether the general rule that a trustee cannot delegate his authority to

another is an obstacle to the exercise of a power by the Appellee to act as executor or trustee where one of the constituent corporations was named as such. That general rule rests upon the ground that the selection of a trustee implies personal confidence in his discretion and judgment. If a power is given to an executor or trustee which is not ministerial or given for the purpose of executing a declared trust which the court can enforce but which involves the exercise of discretion and judgment, the power cannot be delegated or transferred to another, either by the trustee or a court. The rule, however, cannot be applied to the case of a corporation, because the element of trust in the judgment and discretion of an individual is entirely wanting. A corporation is without personality and if it is selected as trustee or executor there can be no reliance upon individual discretion or even upon the continuance of the same administration. Etta Nelson, in naming the Real Estate Title & Trust Co. as executor and trustee, knew that its directors, officers, and stockholders might change from time to time, and that the statute authorized a change of name or place of business, enlargement, or change of the object for which the corporation was formed, an increase or decrease of capital stock or change in the number of shares or par value, increase, or decrease of the number of directors, and the consolidation of the corporation with any other corporation then existing or that might thereafter be organized. She therefore contemplated that these changes might occur, and that the Real Estate Title & Trust Co. might be consolidated with some other corporation such as the Chicago Title & Trust Co., and that it would thereby cease to exist and become a component part of a new corporation. A consolidation took place and a new corporation was created from the original corporations, with an enlarged capital stock and unimpaired franchises."

Again *In Re Bergdorf's Will*, 206 N. Y. 309, 99 N. E. 714, the Court of Appeals of New York held that it was competent for the Legislature to prescribe that in case of

a merger of trust corporations, as an incident thereof, the resulting corporation succeeded to the right to be executor under an unproved will in which the absorbed corporation had been named as executor. The court pointed out that the solution depended on the intention of the Legislature and not upon the intention of the Testator, who must be presumed to have intended the result prescribed by the Legislature in the event of such a corporate merger.

In Re Turner's Estate, 277 Pa. St. 110, 120 Atl. 701, The Rittenhouse Trust Company, a Pennsylvania corporation, had been appointed guardian of certain minors by the court. Subsequently, the Trust Company was converted into a national bank which consolidated with The Corn Exchange National Bank. The latter bank, holding a permit to act as a fiduciary under the Federal Reserve Act, petitioned for payment of the funds of the minors to it. The court held that such national bank had a right to act as guardian and was entitled to have the funds paid to it, and that it was unnecessary for the national bank to agree to comply with the State laws with reference to trust funds because, since the right of the national bank to so act was established by paramount Federal law, the power to exercise the right followed as a necessary incident.

By an Act approved March 11, 1911 and entitled "An Act to Authorize The Old Colony Trust Company, The Massachusetts Trust Company, The Mercantile Trust Company and The City Trust Company to merge," the General Court of Massachusetts asserted the right to provide for the succession as executor of the resulting corporation in exactly the same way in which Congress has provided in the Act under discussion. The constitutionality of that Act of the General Court of Massachusetts has never been challenged.

In *Petition of Commonwealth Atlantic National Bank*, 249 Mass. 240, 144 N. E. 443, the court, in holding that the

consolidated national bank did not succeed to the right to act as the executor of an unproved will in which an absorbed State Trust Company had been named as executor, held that the Federal statute there involved was not explicit with respect to such right of succession under unproved wills, but conceded that the argument would be strong that a statute so providing by a competent legislative body would be effective. It has heretofore been established that the Congress is a competent Legislative body in this matter; the Massachusetts Court concedes that the Congress has now explicitly provided for such succession; it necessarily follows that such provision must be effective. Otherwise, the State may embarrass or defeat the exercise of a clear Federal power.

This case does not depend upon the technical preservation of a fictitious corporate identity. However, if that be material, there does not seem to be any insurmountable difficulty. It is well established that transmutation of a State bank into a national bank pursuant to congressional authority does not destroy the bank's identity or its corporate existence. *Metropolitan National Bank v. Claggett*, 141 U. S. 520; *Michigan Ins. Bank v. Eldred*, 143 U. S. 293; *Atlantic National Bank v. Harris*, 118 Mass. 147; *City National Bank v. Phelps*, 97 N. Y. 44.

Massachusetts General Laws, Chap. 172, Sec. 44, provides that upon any consolidation of a Massachusetts Trust Company, its charter "shall be void except for the purpose of discharging *existing obligations and liabilities.*" It is difficult to see why the duty to discharge an accepted trust as an executor or administrator is not an existing obligation. Hence, under the specific terms of the Massachusetts statute, the corporate identity of the Trust Company may well be considered to continue in the absorbing corporation, so far as is necessary, until the obligation is fully discharged. The discharge of the office of admin-

istrator has been specifically held to be a duty and *obligation* of the appointed corporation. *Worcester County National Bank In Re Parson's Estate* (Mass.) 161 N. E. 797.

The purpose of all statutory construction is to ascertain and carry out the intention of the legislature. The Massachusetts Court admits that Congress intended to provide for succession as executor. The reasonable construction is that it intended to provide for the continuation of the identity of the Massachusetts trust company in the consolidated national bank to the extent that that might be necessary to enable the consolidated institution to discharge the obligation of trustee, executor or administrator.

No question of the construction of wills is involved in this proceeding. However, if it were involved, it is clear that a competent Legislature might provide for the succession of the consolidated corporation as executor under an unproved will, and hence, clearly under an existing appointment as such executor. *Chicago Title & Trust Co. v. Zinser, supra; In Re Bergdorf's Estate, supra; In Re Turner's Estate, supra.* Congress is a competent legislative body in these circumstances; and its legislative determination with respect to succession of executors by national institutions must be equally as effective as the determination of state legislatures with respect to State corporations in similar consolidations or mergers.

Moreover, it is submitted, the Supreme Judicial Court attaches too great significance to the legal fiction of corporate entities. The doctrine of corporate entities is simply a convenient legal fiction. Corporations are the creatures of legislatures; their nature, powers, and attributes are simply what their creators say they are. Likewise, the consolidation or merger of these fictitious legal entities is the creature of the Legislature; and the effect, attributes and incidents of such consolidation or merger are just what the Legislature says they are. The nature of the

attributes and incidents of the consolidation depends upon the intention of the Legislature. *8 Thompson Corporations*, (3rd Ed.) Sec. 6016, pp. 73-74. The courts have never hesitated to look back of the legal fiction of corporate entities where necessary to avoid fraud, circumvention of statute, public wrong or evasion of statutory obligation. *Stockton, Attorney General v. Central Railroad Co., et al.*, 50 N. J. Eq. 52, 17 L. R. A. 97; *People v. North River Sugar Refining Co.*, 121 N. Y. 582, 9 L. R. A. 33; *State ex rel. Attorney General v. Standard Oil Co.*, 49 O. S. 137, 15 L. R. A. 145; *People ex rel. Peabody v. Chicago Gas Trust Co.*, 130 Ill. 268, 8 L. R. A. 497; *United States v. Lehigh Valley R. R. Co.*, 220 U. S. 257; *Miller & Lux v. East Side Canal Co.*, 211 U. S. 293. Similarly, the Court will not hesitate to disregard legal fictions where they are invoked for the purpose of embarrassing Congress in the exercise of an admitted Federal Power. Since the intention of Congress to provide for the succession of the consolidated national bank as executor is clear, an artificial application of the doctrine of corporate entities will not be permitted to defeat the Federal power. A competent legislative body does not have to prescribe an amalgamation which falls in the class of a technical merger or technical consolidation, but it may prescribe any form, kind or degree of amalgamation which it sees fit. Where Congress has clearly manifested its intention, the statute will be so construed as to effect that intention even though the language be inartificial and the mere mechanics of the statutory method must yield to the plain intent.

The artificial character of the decision of the Massachusetts Court is well illustrated by *Petition of Worcester County National Bank In Re Parson's Estate*, 161 N. E. 797. In that case this identical national bank had been appointed administrator prior to its consolidation with the Fitchburg Bank and Trust Company. The Court,

in holding that its appointment as administrator continued unaffected by the consolidation because the corporate entity of the national bank was preserved, said:

> "Its financial resources may have been increased or diminished by the addition of the assets of the trust company and the assumption of its debts, but its *obligations* and duties, not arising out of the consolidation, abide in full force and effect as if there had been no consolidation. Among the duties and obligations which endure undisturbed by the consolidation is the trust to continue and finish the administration of the estate of the decedent."

This case furnishes a good measure of the weight of the arguments advanced by the Massachusetts Court in support of its proposition that the Worcester County National Bank could not be lawfully authorized to succeed the Fitchburg Bank and Trust Company, as executor, by operation of law. We have the spectacle of the identical national bank being held to have the right to continue to hold its appointment as administrator, subsequent to the consolidation, in one case on the ground that the appropriate legalistic words have been spoken to continue its fictitious corporate entity, while it is held, by the same court, in another case that although clearly provided by the legislature authorizing the consolidation, it cannot be lawfully authorized to continue the office of executor, subsequent to the consolidation, which was existing in the absorbed Trust Company, because the court must have the right to pass judicially upon the financial integrity, reputation and policy of the consolidated corporation. We have a case where, in fact, everything that had happened with respect to the financial standing, character and policy of the trustee corporation in the instant case, had likewise happened in the character, standing and policy of the corporate trustee in the case last cited. If the consolidated bank, the Worcester County National Bank, was unfit or incapaci-

tated to succeed to the executorship in the instant case by the operation of law because the changes incident to the consolidation required a fresh examination of its fitness by the Probate Court, how could the Worcester County National Bank be fitted to continue its duties as administrator in the Parson's Estate, subsequent to the consolidation, without a fresh judicial determination of its fitness by the Probate Court? The distinction sought to be found by the Supreme Judicial Court of Massachusetts in the instant case rests upon wholly artificial legal fictions.

None of the cases cited by the Supreme Judicial Court of Massachusetts, with respect to the division of powers among the several departments of the Government under the Federal Constitution, seem applicable or even relevant to the facts of this case. The cases hereinbefore cited in this section amply demonstrate that the provision for the succession as executor of the consolidated corporation as an incident of the consolidation is not an exercise of judicial power in contravention of the Constitution of the United States. (See particularly *In Re Turner's Estate*, *supra*, 277 Pa. 110, 120 Atl. 701; also *In Re Bergdorf's Will*, *supra*, 286 N. Y. 308, 99 N. E. 714; *Chicago Title & Trust Co. v. Zinser*, *supra*, 264 Ill. 31, 105 N. E. 718; *Mercantile Trust Co. v. San Joaquin Agricultural Corporation*, *supra*, (Cal.) 265 Pac. 583; *Iowa Light H. & P. Co. v. First National Bank of Boston*, *supra*, 250 Mass. 353, 145 N. E. 433; *McElwain v. Primavera*, *supra*, 167 N. Y. S. 815).

The conclusion of the Supreme Judicial Court of Massachusetts that the clause of *12 U. S. C. A., Chapter 2, Sec. 34a* which provides for the succession of the national bank as executor, by operation of law, is in contravention of the law of Massachusetts, is based upon the proposition that the appointment of an executor is an exercise of judicial power which it is incompetent for the Legislature to assume to perform. It is not claimed that this contravenes

any statute of Massachusetts. Part 1 of Article 30 of the Bill of Rights prohibits the Legislative Department from exercising judicial power. In reply to this, it may be observed that the statute under examination deals with the powers of consolidated corporations; and while it provides for succession it still leaves the executor subject to removal by the court in proper cases, so that the judicial power is not in any way interfered with. As a matter of fact courts do not appoint executors. *In Re Bergdorf's Will*, 206 N. Y. 309, 99 N. E. 714; *Parker v. Sears*, 117 Mass. 513; *National Bank v. Eldridge*, 115 Mass. 424. The right to act as executor or administrator of a decedent's estate is not a natural right, but resides first in the state, and the state may place the administration in the hands of its own officials and not leave them to administrators appointed by courts. *In re McWhirter's Estate*, 235 Ill. 607, 85 N. E. 918. This policy has been followed in several states and it is not always required that the Probate Court should be consulted in such matters. *Leever v. Taylor*, 111 Mo. 312, 19 S. W. 955; *Brinckwirth's Estate v. Troll*, 266 Mo. 473. Even in Massachusetts, under Section 17, Chapter 194 of Public Statutes, the public administrator proceeds summarily in estates under $100.00 in value without procuring Letters of Administration at all. The power of Legislatures to deal with trusts without infringing judicial power is illustrated in *Saydam v. Williamson*, 24 Howard 427; *Hoyt v. Sprague*, 103 U. S. 613; *Watkins v. Holman*, 16 Peters 25.

As a matter of fact the Legislature of Massachusetts has exercised the very power with regard to state institutions which Congress has sought to exercise in the Act under examination. By an Act approved March 11, 1911, The Old Colony Trust Company, The Massachusetts Trust Company, The Mercantile Trust Company and The City Trust Company were authorized to merge, and the Act expressly provided that all trusts, whether as executor or

administrator, trustee or otherwise, should inure to the merged corporation. The powers conferred by this act have been in operation covering a vast number of executorships and fiduciary relations of all kinds, and its validity has never been questioned.

Even the power of removal as to executors or administrators has been made the subject of statutory regulations. *Haddick v. District Court*, 160 Ia. 487, and see cases cited in note, *Annotated Cases 1915 D, pages 284 to 287; Dunlap v. Kennedy*, 10 Bush (Ky.) 539.

As a matter of fact the law is generally well settled to the effect that Probate Courts exercise powers granted them by legislation in the appointment of administrators and trustees, and in the supervision of decedents' estates; and it is equally well settled that all lawful changes in a corporate trustee or executor are held to have been within the legal contemplation and purview of the original order of appointment.

The alleged impropriety of the succession of the National Bank as executor in the instant case is based by the Massachusetts Court upon the following argument:

> "It is quite possible that none of the officers of the Fitchburg Bank and Trust Company, in reliance upon whose character, sagacity and skill the original appointment as executor was made in the case at bar, continue as officers of the national banking association. The stockholders hardly can be the same. Its general policy of business and trust administration may have been entirely altered. Its reputation with respect to these matters may have changed radically as a consequence of the consolidation."

Every change in the corporate executor which is set forth in the foregoing quotation could as readily take place if there had never been any change in the corporate structure of the Fitchburg Bank and Trust Company, yet it would hardly be contended that such changes taking place

within the original corporate structure of the corporate executor would *ipso facto* work a vacation of its appointment as such executor. Changes in the qualities of executors or trustees, corporate or individual, may give rise to an occasion for the exercise of the power of removal. The courts have continuing powers over trustees in the interest of the trusts. But the courts may not defeat the legislative policy of the state by removing trustees because of changes in their qualities authorized by law, unless the changes fairly affect the capacity of the trustee to execute the trust. If changes in the corporate organization or qualities of trust companies be held automatically to determine their trustee relations without the intervention of the court or agency through which the trust relation was created, then either the legislature must refrain from remodeling and controlling its corporate creatures or run the risk of confusion and loss to the estates held in trust at the time of any change. Such a construction in effect makes of a statute authorizing a change in a corporate trustee, a legislative removal of a trustee appointed by judicial proceedings.

Such a statute, therefore, is not the legislative performance of a judicial act but a legislative declaration of what the effect shall be of a law passed by the legislature and is, therefore, a statement of what the law is which the court is to administer. The legislature makes the law and the court applies it. The judicial function is to appoint, control and remove trustees in accordance with the law. With this function the act in question does not interfere. It merely changes the law which the court is to apply.

The real basis of the decision of the Massachusetts Court is set out in the following language:

> "That section, according to its plain interpretation, has a signal force and effect in its application to appointment of fiduciaries by courts of this commonwealth. That section requires the courts of this com-

monwealth to recognize and accept, without inquiry or hearing, as fiduciary in place of a state trust company now gone out of existence, which was appointed by the court by solemn decree, a national bank which is a different corporation established *under the laws of a different sovereignty possessed of different powers, owing allegiance to a different jurisdiction, governed by different laws, subject to different governmental supervision, and controlled by different officers.*"

The fact that there may be different corporate officers may be readily disregarded as immaterial for the reason that if there had been no consolidation, a change in corporate officers could as readily occur; and no one would contend that a change in corporate officers of a corporate executor works an abandonment or vacation of its appointment as executor or trustee. Every other consideration which is mentioned by the Massachusetts Court refers to matters and circumstances which would not be open to the consideration of the Probate Court if it were passing upon the appointment of such corporation as an administrator in the first instance, unless it can be said that the Massachusetts Court could discriminate against the petitioner because it is a National Bank. All of the considerations which are enumerated by the Massachusetts Court, except the reference to change in officers, amount simply to saying that it is a national instead of a state corporation. By asserting the right to consider its character as a national corporation in determining whether it should be appointed or continued as an executor, the Massachusetts Court is simply claiming the right to discriminate against it because it is a national corporation. That no such right exists in the State Court is well settled. *First National Bank v. Fellows*, 244 U. S. 416; *Barnes National Bank v. Duncan*, 265 U. S. 17; *Estate of Stanchfield*, 171 Wis. 553; *Hamilton v. State*, 94 Conn. 648, 110 Atl. 54; *In Re Turner's Estate*, 277 Pa. 110, 120 Atl. 701; *Fidelity National Bank v. Enright*, 264 Fed. 236.

III.

THE CONSTITUTIONALITY OF THE ACT IS LIKEWISE SUSTAINED BY THE CONTEMPORANEOUS INTERPRETATION AND APPLICATION OF THE ACT BY THE FEDERAL AGENCIES ENTRUSTED WITH ITS ADMINISTRATION.

The duty of interpreting and administering *12 U. S. C. A., Chapter 2, Sec. 34a* is imposed upon the Comptroller of the Currency and the Federal Reserve Board. The contemporaneous interpretation of the Act by both Federal agencies fully sustains Appellant's contention that the Act is constitutional. Their respective interpretations demonstrate that the purpose of the Act was within the scope of the Constitution, that the end was legitimate and that the means adopted were appropriate to that end. The Court is, of course, the final arbiter of the scope of the constitutional power of all departments of the government; the other coordinate departments of the Government are, however, entitled and compelled, in the first instance, to judge of the Constitution for themselves. This is peculiarly true of officers charged with the administration of a statute. The Comptroller had brought the evils, which the law was designed to remedy, to the attention of the Congress and was peculiarly familiar with the purposes and scope of the Act. Hence, the fact that the interpretation of the administrative officers supports the constitutionality of the Act is persuasive.

An opinion of the Comptroller of the Currency with reference to the scope and constitutionality of the McFadden Act is found on pages 267 to 271 of the Annual Report of the Federal Reserve Board for the year 1927. This Annual Report was submitted to the Speaker of the House of Representatives in accordance with the requirements of Sec. 10 of the Federal Reserve Act (U. S. C. Title 12, Chapter 3, Sec. 247). In his opinion the Comptroller said in part:

"Since the decision of the Supreme Court of Pennsylvania in the *Turner* case and, in view of the decisions of the Supreme Court of the United States as to the effect of the conversion of a State bank into a national bank, there is no doubt as to the right of a national bank resulting from the conversion of a State trust company to continue to handle the trust business already on the books of the trust company at the time of the conversion and to act in all fiduciary capacities in which the trust company had been appointed to act prior to the conversion.

Even prior to the enactment of the McFadden Bill, therefore, the only possible doubt about the matter was with respect to the right of the national bank to be appointed as executor, trustee, etc., under wills naming the trust company to act in such capacities which were executed prior to the conversion and were not admitted to probate until after the conversion. The only doubt on this question was raised by the decision of the Supreme Court of Massachusetts, in the case of the *Petition of the Commonwealth-Atlantic National Bank*, 144 N. E. 443. That case did not pass upon the right of a national bank to act in fiduciary capacities or its right to continue to handle trusts already vested in the trust company, but involved merely the right of a national bank to act as executor under a will executed prior to the conversion which named the trust company as executor. The Massachusetts Court recognized the fact that, under the decisions of the Supreme Court of the United States, the national bank was the same institution as the trust company and that the corporate existence of the trust company was continued in the national bank; but avoided holding that the national bank must be appointed executor by making its decision turn upon a construction of the will. In construing the will, the Court held that the testator intended to have a trust company organized under State law and governed by the provisions of the State law act as his executor, and that it would not be carrying out the intention of the testator to permit the national bank so to act.

In order to eliminate the doubt raised by the decision of the Supreme Court of Massachusetts, there was inserted in Section 1 of the McFadden Bill a provision to the effect that, where a State bank or trust company consolidates with a national bank * * *.

This provision was entirely unnecessary as to business already on the books of the trust company; because under court decisions rendered prior to the enactment of the McFadden Bill, it was held that the consolidated national bank could continue to handle all such business. I have no doubt, therefore, that the courts will take cognizance of this fact and will construe the above quoted provision of the McFadden Bill to have the effect that it was intended to have, viz: **To prevent the State courts from refusing to appoint national banks as executors, trustees, etc., under wills naming trust companies to act in such capacities, where such trust companies have been converted into or consolidated with national banks before such wills are probated.**

Nor have I any doubt as to the constitutionality of this provision of the McFadden Bill. National banks are instrumentalities of the Federal Government created by Congress to perform certain essential functions for the Federal Government, and the Supreme Court of the United States has repeatedly held that Congress may enact whatever legislation is necessary to preserve their existence. The decision of the Massachusetts Court having raised doubts as to the rights of converted or consolidated national banks *which might cause persons seeking to consolidate trust companies with national banks to prefer State charters thereby depriving the Federal Government of its instrumentalities*, there can be no doubt of the constitutional power of Congress to eliminate this doubt by enacting the above-quoted provision of the McFadden Bill. As said by the Supreme Court of the United States in *First National Bank v. Fellows, supra:*

> "* * * This must be since the State may not by legislation create a condition as to a particular business which would bring about actual or potential

competition with the business of national banks and at the same time deny the power of Congress to meet such created condition by legislation appropriate to avoid the injury which otherwise would be suffered by the national agency.'

If any one has any doubt of the power of Congress thus to interfere with the appointment of executors, trustees, etc., by the State courts, the answer is to be found in the following language of the Supreme Court of the United States in *State of Missouri ex rel. Burnes National Bank v. Duncan, supra:*

'The State cannot lay hold of its general control of administration to deprive national banks of their power to compete that Congress is authorized to sustain.' "

The Federal Reserve Board in the discharge of its statutory duty promulgated the following regulation as supplemental to *12 U. S. C. A., Chapter 2, Sec. 34a:*

"The purpose of this provision is to make clear the right of such a consolidated national bank to succeed to the specific trusteeships, executorships, and other fiduciary appointments under which the State institution was acting prior to the consolidation or in which it had been appointed or designated to act under wills or other instruments which had not became effective at the time of consolidation through the death of a testator, the probate of a will or otherwise; but it does not confer upon such national banks the right to act generally in fiduciary capacities or to undertake any new trust business. It is necessary for the consolidated national bank to have a permit from the Federal Reserve Board to act in fiduciary capacities, therefore, before undertaking to act generally in fiduciary capacities or to accept any new trust business. If the national bank does not desire to act generally in fiduciary capacities or to accept any new trust business, but desires merely to continue to execute the specific trusteeships, executorships, and other fiduciary affairs which were actually being executed by the

State institution at the time of the consolidation or which the State institution had been designated to execute under wills or other instruments which had not yet become effective through the death of the testator, the probate of the will or otherwise, it is not technically necessary for the national bank to have a permit from the Federal Reserve Board in order to execute such specific trusts; but it is advisable for the national bank to have such a permit, in order that its right to continue to execute these trusts may not be questioned. In all cases involving the consolidation of a State institution having a trust business with a national bank under the provisions of the abovementioned act, therefore, the national bank should obtain from the Federal Reserve Board a permit to act in fiduciary capacities before the consolidation becomes effective, unless such national bank already has such a permit."

Annual Report, Federal Reserve Board, 1927, p. 287.

Thus we find that the respective interpretations of this Act by the Comptroller of the Currency and The Federal Reserve Board are in agreement and support the conclusion that the Act is constitutional. It is likewise apparent that great interests have been created, in reliance upon such interpretation and administration of the Act by these Federal agencies, which would be seriously injured, if not destroyed, by judicial declaration that this law is unconstitutional. These circumstances are, of course, not controlling upon the Court, yet they would be entitled to great weight if the statute were of doubtful constitutionality. It is submitted that it is unnecessary to resort to such considerations in this case because the statute is clearly constitutional; nevertheless they are persuasive confirmation of the correctness of that conclusion.

CONCLUSION.

In conclusion we submit that the only material question in this case is the constitutionality of the statute under which the consolidation of the Worcester County National Bank took place. That Congress has the power to create National Banks, and to enact whatever legislation is necessary to preserve their existence, is conclusively established by the decisions of this Court.

We have shown that the legislation here under examination is necessary for the preservation of the National Banking System, since without it the Federal government would lose these indispensable federal instrumentalities through their consolidation with State Banks and Trust Companies under state charters instead of under national charters. We, therefore, submit that the legislation is not only appropriate, but is necessary to the preservation of the National Banking System and of the Federal Reserve System, and is clearly constitutional.

Respectfully submitted,

WILLIAM T. FORBES,
Counsel for Appellant.

Of Counsel:

NEWTON D. BAKER.

In the Supreme Court of the United States

OCTOBER TERM, 1928.

No. 469.

EX PARTE WORCESTER COUNTY NATIONAL BANK of Worcester, a corporation,

Appellant,

IN RE ESTATE OF JULIA A. LEONARD.

STATEMENT OF BASIS OF JURISDICTION.

NEWTON D. BAKER,
Attorney for Petitioner and Appellant.

B. F. PERRY,
Of Counsel.

WM. T. FORBES,
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1928.

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Attorney for Petitioner and Appellant.

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WM. T. FORBES,
Of Counsel.

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No. 469.

EX PARTE WORCESTER COUNTY NATIONAL BANK of Worcester, a corporation,

Appellant,

IN RE ESTATE OF JULIA A. LEGNARD.

STATEMENT OF BASIS OF JURISDICTION.

I.

STATUTORY PROVISION UPON WHICH JURISDICTION IS PREDICATED.

The jurisdiction of the Supreme Court on this appeal from the final judgment of the Probate Court of Worcester County, Commonwealth of Massachusetts, is invoked under Section 237-(a) of The Judicial Code, U. S. C. A. Title 28, Chapter 9, Sec. 3441, of which the pertinent provision reads as follows:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; * * * may be reviewed by the Supreme Court * * *."

II.

DATE OF JUDGMENT SOUGHT TO BE REVIEWED AND OF APPEAL THEREFROM.

The final judgment upon which this appeal is taken was entered in the Probate Court of Worcester County, Massachusetts, pursuant to the directions contained in a rescript from the Supreme Judicial Court of Massachusetts on June 14, 1928. (Unprinted Record 10.) The Appellant presented its petition for appeal from said final judgment to the first presiding Judge of the Probate Court of Worcester County, Massachusetts, on September 12, 1928, and the appeal was allowed on the same day (Unprinted Record 33-38).

III.

THE NATURE OF THE CASE AND OF THE RULINGS BELOW WHICH BRING IT WITHIN THE JURISDICTIONAL PROVISION INVOKED.

On March 17, 1926, the Fitchburg Bank & Trust Company, a corporation organized under the laws of the Commonwealth of Massachusetts, filed its petition for appointment as Executor under the Will of Julia A. Legnard. (Unprinted Record 6.) On the same day the Fitchburg Bank & Trust Company filed its bond without surety with the Probate Court for the County of Worcester in the sum of Seven Thousand Five Hundred Dollars ($7,500.00). (Unprinted Record 8.) This bond was approved by the Probate Court on April 21, 1926, at which time the Probate Court appointed the Fitchburg Bank & Trust Company Executor of the Last Will and Testament of Julia A. Legnard. (Unprinted Record 9.)

The Will of Julia A. Legnard, after making certain specific bequests, devised the residue of her estate to the Fitchburg Bank & Trust Company, in trust, and appointed

the Fitchburg Bank & Trust Company sole Executor of the Will. (Unprinted Record 4.)

The Merchants National Bank of Worcester, a national bank organized under the laws of the United States and located in the City and County of Worcester, Commonwealth of Massachusetts, and the Fitchburg Bank & Trust Company, located in the County of Worcester, Commonwealth of Massachusetts, were consolidated June 27, 1927 under the charter of The Merchants National Bank of Worcester and under the corporate title of "The Worcester County National Bank of Worcester," as certified to by the Comptroller of the Currency. (Unprinted Record 12-13.) This consolidation was had under the provision of the Act of Congress to further amend the National Banking laws and The Federal Reserve Act and for other purposes approved February 25, 1927, Chapter 191, Sec. 3, 44 U. S. Statutes at Large, Part 2, 1224, 1225 (McFadden Act) amending the Act approved November 7, 1918, Chapter 209, Sec. 2, 40 U. S. Statutes at Large 1044. The portion of the foregoing Statute which was held unconstitutional and void by the Supreme Judicial Court of Massachusetts reads:

> "And all the rights, franchises, and interests of such State or District bank so consolidated with a national banking association in and to every species of property, real, personal and mixed and choses in action thereto belonging, shall be deemed to be transferred to and vested in such national banking association into which it is consolidated without any deed or other transfer, and the said consolidated national banking association shall hold and enjoy the same and all rights of property, franchises, and interest *including the right of succession as trustee, executor, or in any fiduciary capacity in the same manner and to the same extent as was held and enjoyed by such State or District bank so consolidated with such national banking association.*"

On February 11, 1928, The Worcester County National Bank of Worcester, as successor to said Fitchburg Bank & Trust Company, Executor, filed its First and Final Account and Petition for its allowance as Executor of the Last Will and Testament of Julia A. Legnard with the Probate Court for Worcester County, Commonwealth of Massachusetts. (Unprinted Record 10.) This account is for the period beginning the 21st day of April A. D. 1926 and ending with the 9th day of February A. D. 1928. The account is rendered by The Worcester National Bank of Worcester for the Fitchburg Bank & Trust Company to June 27, 1927, and thereafter as its own account. (Unprinted Record 10.)

Under date of February 15, 1928, the Judge of the Probate Court for Worcester County reported his finding of the material facts in a reservation to the Supreme Judicial Court of Massachusetts, requesting an opinion "as to whether the petitioner is entitled to render said account." (Unprinted Record 11-13.)

The Probate Court specifically found that the account was "in proper form for allowance and should be allowed as rendered if the said The Worcester National Bank, as successor or otherwise, is Executor of said Will, or has the right to render said account under the laws of the United States." The Court found that the Fitchburg Bank & Trust Company and The Merchants National Bank of Worcester were consolidated June 27, 1927 under the corporate title of "The Worcester County National Bank of Worcester" and that the accountant and appellant had continuously had permission since March 24, 1915 to act as Executor under the provisions of Sec. 11-K of the Act of Congress, approved December 23, 1915, and known as The Federal Reserve Act. (Unprinted Record 12-13).

The Supreme Judicial Court for the Commonwealth of Massachusetts under date of May 24, 1928, directed the

following rescript to the Probate Court for Worcester County answering the question reserved, as follows, to-wit:

> "The question reported, namely, 'whether the petitioner is entitled to render said account' is answered in the negative. Probate Court instructed accordingly." (Unprinted Record 14.)

The Supreme Judicial Court further stated:

> "The reasons of the decision are set forth at length in the Opinion, filed with the Reporter of Decisions, to which reference is made." (Unprinted Record 15).

The Opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts was rendered by Chief Justice Rugg. (Unprinted Record 16-32, incl.)

In deciding the case the Supreme Judicial Court of Massachusetts construed the Act of Congress approved on February 25, 1927, Chapter 191, Sec. 3, 44 U. S. Statutes at Large 1244-1245, amending the Act approved December 7, 1918, Chapter 209, Sec. 2, 40 U. S. Statutes at Large 1044, as unconstitutional. The Court held:

> "We feel compelled to reach the conclusion that this clause of said Sec. 3, Chapter 191, Act of Congress, approved February 25, 1927, here under discussion, is unconstitutional", (Unprinted Record 30),

and further:

> "The final determination based upon all branches of this judgment is that the Act of Congress of February 25, 1927, Chapter 191, Sec. 3, as we have interpreted its meaning and with the clause requiring the Courts of this Commonwealth to recognize the National Bank as holding without new appointment the fiduciary position held by the Trust Company (is) stricken down as unconstitutional * * *". (Unprinted Record 31).

Pursuant to the rescript of the Supreme Judicial Court, the Probate Court for Worcester County entered final judgment in this case on the 14th day of June, 1928, as follows, (Unprinted Record 10) to-wit:

> "The foregoing account having been presented for allowance, after rescript from the Supreme Judicial Court (Full Court), and pursuant to the terms of said rescript, it appearing that The Worcester County National Bank of Worcester, Accountant and Petitioner in this case, has not succeeded the Fitchburg Bank & Trust Company as Executor of the Will of said Testatrix and is not entitled to render this account, this petition for the allowance of the same is hereby dismissed."

IV

CASES CITED TO SUSTAIN JURISDICTION OF THIS COURT.

A.

The judgment from which this appeal is taken is a final judgment in the highest court of the State of Massachusetts in which a decision in this case could be had and appeal is properly taken from the Probate Court.

Under the provisions of the General Law, 1921, Chapter 211, a judgment entered in an inferior court of that State, pursuant to a rescript from the Supreme Judicial Court constitutes a final decree and is not appealable. *Boston, Petitioner*, 223 Mass. 36 and Cases cited.

Under that practice the judgment of the inferior court is regarded as the final decision of the highest court of the State of Massachusetts in which a decision could be had and the writ to or appeal from such decision is properly directed to the inferior court. *Davis vs. Cohen*, 268 U. S., 638, 639; *Myers vs. International Trust Company*, 273 U. S., 380, 381. This conclusion is further strength-

ened in this case by the fact that the Supreme Judicial Court of Massachusetts holds that an Executor has no such personal interest in his office as enables him to appeal from an order of the Probate Court removing him. *Hayden vs. Keown*, 232 Mass. 259, 122 N. E. 264, 265, 266.

We also invite the attention of the Court to:

Kentucky vs. Power, 201 U. S. 1;
McDonald vs. Massachusetts, 18 U. S., 311;
Gregory vs. McVeigh, 90 U. S., 311.

B.

Since the final judgment in this case holds, as the basis of the judgment, that a Statute of the United States is invalid, the judgment is appealable to this Court.

Since the final judgment of the highest court of the State of Massachusetts in which a decision in this particular suit could be had holds that a Statute of the United States is invalid, the party aggrieved has the right to invoke the appellate jurisdiction of this Court under Section 237 (a) of the Judicial Code. *Longest vs. Langford*, 274 U. S., 499; *Jones National Bank vs. Yates*, 240 U. S., 541. While the jurisdiction of this Court was formerly invoked by writ of error in such cases, it is now invoked by appeal under the provisions of the Act of January 31, 1928, Chapter 8, Secs. 1 and 2.

V.

NOTICE TO APPELLEE.

Since there are no objections to the petition or account of the appellant, there are no appellees to serve under the Massachusetts practice followed in this case. In lieu thereof and to comply with the rules of this Court as far as the facts would permit, notice was served upon Honorable Frederick H. Chamberlain, First Judge of the Pro-

bate Court of Worcester County, and on Honorable Joseph E. Warner, Attorney General of the Commonwealth of Massachusetts (Unprinted Record 39, 40). This Statement of the Basis of Jurisdiction on this appeal is likewise being served upon them.

The case was docketed with this Honorable Court on the 25th day of September, 1928.

Respectfully submitted,

NEWTON D. BAKER,

Attorney for Petitioner and Appellant.

B. F. FIERY,

Of Counsel.

WM. T. FORBES,

Of Counsel.

In the

Supreme Court of the United States.

OCTOBER TERM, 1938.

No. 469.

EX PARTE WORCESTER COUNTY NATIONAL BANK OF WORCESTER,
Appellant.

MOTION OF ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS FOR LEAVE TO FILE BRIEF AND TO MAKE ORAL ARGUMENT IN SUPPORT OF DECISION BELOW.

BRIEF OF THE ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, IN HIS OWN BEHALF, IN BEHALF OF THE SAID COMMONWEALTH, AND IN BEHALF OF THE FIRST JUDGE OF PROBATE OF THE COUNTY OF WORCESTER IN SAID COMMONWEALTH.

JOSEPH E. WARNER, *Attorney General,*
F. DELANO PUTNAM, *Assistant Attorney General,*
R. AMMI CUTTER, *Assistant Attorney General,*
Of the Commonwealth of Massachusetts.

In the
Supreme Court of the United States.

OCTOBER TERM, 1928.

No. 469.

EX PARTE WORCESTER COUNTY NATIONAL BANK OF WORCESTER, *Appellant.*

MOTION OF THE ATTORNEY GENERAL OF MASSACHUSETTS FOR LEAVE TO FILE A BRIEF AND MAKE AN ORAL ARGUMENT IN THIS COURT IN SUPPORT OF THE STATE COURT DECISION FROM WHICH THIS APPEAL IS TAKEN.

Now comes Joseph E. Warner, Attorney General of the Commonwealth of Massachusetts, and respectfully represents as follows:

1. This is an appeal by a national bank from a decree of the Probate Court of Worcester County, Massachusetts (entered in consequence of a decision of the highest court of that state), denying to said national bank the right to file an account as alleged executor under the will of one Legnard.

2. In very brief form the question of law to be decided by this Honorable Court is the following: Must the Probate Court of Worcester County, Massachusetts, having appointed the Fitchburg Bank and Trust Company (a state bank) executor of the will of a certain person, thereafter accept automatically and without any further Probate

Court proceedings an account rendered by the Worcester County National Bank of Worcester as such executor, solely because, after its appointment as executor, the Fitchburg Bank and Trust Company merged with the Merchants National Bank of Worcester under the latter's charter and under the name of Worcester County National Bank of Worcester? Said merger was in accordance with the provisions of Act of February 25, 1927, c. 191, §1 (44 STAT. AT L., pt. 2, 1224-1225), the material portions of which are as follows:

> "That any bank incorporated under the laws of any State . . . may be consolidated with a national banking association located in the same county . . . under the charter of such national banking association . . . and all the rights, franchises, and interests of such State . . . bank so consolidated with a national banking association in and to every species of property, real, personal, and mixed, and choses in action thereto belonging, shall be deemed to be transferred to and vested in such national banking association into which it is consolidated without any deed or other transfer, and the said consolidated national banking association shall hold and enjoy the same and all rights of property, franchises and interests *including the right of succession as trustee, executor, or in any other fiduciary capacity* in the same manner and to the same extent as was held and enjoyed by such State . . . bank so consolidated with such national banking association. . . ." (Italics ours.)

The state courts answered this question of law in the negative. *Worcester County National Bank of Worcester, petitioner*, 162 N.E. 217; 1928 Mass. Adv. Sh. 1213.

3. Owing to the form in which this litigation arose in the state court, the only party of record therein is the

national bank. All persons interested in the account have assented to its allowance (R. 11), so that there is no party now before this Court who can be heard in support of the state court decision which is here attacked. The decision involves a matter of great importance to Massachusetts and to other States which permit the appointment by Probate Courts of banking corporations to fiduciary positions.

Wherefore said Joseph E. Warner, Attorney General as aforesaid, respectfully moves this Honorable Court for leave to file the accompanying brief and make an oral argument in support of said state court decision, and, in the alternative, respectfully moves this Honorable Court for leave to file the accompanying brief as *amicus curiae* in support of said state court decision.

JOSEPH E. WARNER,
Attorney General of Massachusetts.
FRANKLIN DELANO PUTNAM,
Assistant Attorney General of Massachusetts.
RICHARD AMMI CUTTER,
Assistant Attorney General of Massachusetts.

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In the
Supreme Court of the United States.

OCTOBER TERM, 1928.

No. 469.

EX PARTE WORCESTER COUNTY NATIONAL BANK OF WORCESTER, *Appellant.*

BRIEF OF THE ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, IN HIS OWN BEHALF, IN BEHALF OF THE SAID COMMONWEALTH, AND IN BEHALF OF THE FIRST JUDGE OF PROBATE OF THE COUNTY OF WORCESTER IN SAID COMMONWEALTH.

REFERENCE TO THE OFFICIAL REPORT OF THE OPINION DELIVERED BELOW.

The case was heard on appeal (R. 14) by the Supreme Judicial Court for the Commonwealth of Massachusetts prior to the entry of final decree after rescript (R. 10) in the Probate Court for the County of Worcester. The opinion of the Supreme Judicial Court (R. 15-30) is officially reported in 1928 Massachusetts Advance Sheets, p. 1213, and in 263 Massachusetts Reports, at a page at present not available. See also 162 N.E. 217.

CONCISE STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The appellant, in accordance with paragraph 1 of Rule 12 of the Revised Rules of this Honorable Court, duly filed a statement disclosing the alleged basis of the jurisdiction of this Court; to wit, that the final decree after rescript of the Probate Court for the County of Worcester (the highest court in the Commonwealth of Massachusetts in which a final decision in this cause could be had) was against the validity of a portion of section 1 of the Act of Congress approved February 25, 1927 (c. 191, §3, 44 STAT. AT L., pt. 2, 1224, 1225).

This Honorable Court, on December 3, 1928, announced that it had found that probable jurisdiction had been shown by the appellant. See Judicial Code, §237 (*a*), as amended by Act of February 13, 1925, c. 229, 43 STAT. AT L., 936, 937. Counsel here make no contention that this Honorable Court has not jurisdiction to review the final decree of the Probate Court for the County of Worcester in this cause. In view of the provisions of Rule 27, art. 2, cl. (*c*), of the Rules of this Honorable Court, we deem no further statement as to jurisdiction to be necessary here.

STATEMENT OF THE CASE.

By the last will of Julia A. Legnard (R. 2), late of Fitchburg, Worcester County, Massachusetts, dated January 12, 1926, the Fitchburg Bank and Trust Company was nominated (R. 3) sole executor. Julia A. Legnard died on March 14, 1926 (R. 4). Upon suitable petition (R. 4) the Probate Court for the County of Worcester, by decree entered April 21, 1926 (R. 5), appointed said Fitchburg Bank and Trust Company of Fitchburg as executor of the will of the testatrix. The Fitchburg Bank and Trust Company duly qualified as executor by giving bond (R. 5-6, 11-12).

Subsequent to its appointment and qualification as such executor, the Fitchburg Bank and Trust Company and the Merchants National Bank of Worcester, a national bank organized under the laws of the United States and located in Worcester, were consolidated on June 27, 1927, under the charter of the Merchants National Bank of Worcester and under the new corporate title of the Worcester County National Bank of Worcester (R. 12). The consolidation took place in purported compliance with the provisions of the Act of Congress of February 25, 1927, §1, c. 191, §3, 44 STAT. AT L., pt. 2, 1224, 1225; U.S. Code, tit. 12, c. 2, §34*a*, which reads:

> "*Consolidation of state bank, etc., with national bank; capital stock; dissenting shareholders.* Any bank incorporated under the laws of any State, or any bank incorporated in the District of Columbia, may be consolidated with a national banking association located in the same county, city, town, or village under the charter of such national banking association on such terms and conditions as may be lawfully agreed upon by a majority of the board of directors of each association or bank proposing to consolidate, and which agreement shall be ratified and confirmed by the affirmative vote of the shareholders of each such association or bank owning at least two-thirds of its capital stock outstanding, or by a greater proportion of such capital stock in the case of such State bank if the laws of the State where the same is organized so require, at a meeting to be held on the call of the directors after publishing notice of the time, place, and object of the meeting for four consecutive weeks in some newspaper of general circulation published in the place where the said association or bank is situated, and in the legal newspaper for the publication of legal notices or advertisements, if any such

paper has been designated by the rules of a court in the county where such association or bank is situated, and if no newspaper is published in the place, then in a paper of general circulation published nearest thereto, unless such notice of meeting is waived in writing by all stockholders of any such association or bank, and after sending such notice to each shareholder of record by registered mail at least ten days prior to said meeting, but any additional notice shall be given to the shareholders of such State bank which may be required by the laws of the State where the same is organized. The capital stock of such consolidated association shall not be less than that required under existing law for the organization of a national banking association in the place in which such consolidated association is located; and all the rights, franchises, and interests of such State or District bank so consolidated with a national banking association in and to every species of property, real, personal, and mixed, and choses in action thereto belonging, shall be deemed to be transferred to and vested in such national banking association into which it is consolidated without any deed or other transfer, and the said consolidated national banking association shall hold and enjoy the same and all rights of property, franchises, and interests including the right of succession as trustee, executor, or in any other fiduciary capacity in the same manner and to the same extent as was held and enjoyed by such State or District bank so consolidated with such national banking association. When such consolidation shall have been effected and approved by the comptroller any shareholder of either the association or of the State or District bank so consolidated, who has not voted for such consolidation, may give notice to the directors of the consolidated association within twenty days from the date of the cer-

tificate of approval of the comptroller that he dissents from the plan of consolidation as adopted and approved, whereupon he shall be entitled to receive the value of the shares so held by him, to be ascertained by an appraisal made by a committee of three persons, one to be selected by the shareholder, one by the directors of the consolidated association, and the third by the two so chosen; and in case the value so fixed shall not be satisfactory to such shareholder he may within five days after being notified of the appraisal appeal to the Comptroller of the Currency, who shall cause a reappraisal to be made, which shall be final and binding; and the consolidated association shall pay the expenses of reappraisal, and the value as ascertained by such appraisal or reappraisal shall be deemed to be a debt due and shall be forthwith paid to said shareholder by said consolidated association, and the shares so paid for shall be surrendered and, after due notice, sold at public auction within thirty days after the final appraisement provided for in this section; and if the shares so sold at public auction shall be sold at a price greater than the final appraised value, the excess in such sale price shall be paid to the said shareholder; and the consolidated association shall have the right to purchase such shares at public auction, if it is the highest bidder therefor, for the purpose of reselling such shares within thirty days thereafter to such person or persons and at such price as its board of directors by resolution may determine. The liquidation of such shares of stock in any State bank shall be determined in the manner prescribed by the law of the State in such cases if such provision is made in the State law; otherwise as hereinbefore provided. No such consolidation shall be in contravention of the law of the State under which such bank is incorporated.

> "The words 'State bank,' 'State banks,' 'bank,' or 'banks,' as used in this section, shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws."

Said consolidation was duly approved by the Comptroller of the Currency (R. 13). No change in the administration of the estate of Julia A. Legnard appeared upon the records of the Probate Court for the County of Worcester, unless the filing of a copy of the certificate of the Comptroller of the Currency approving the consolidation of these banks constituted such a change (R. 12).

On February 11, 1928, the Worcester County National Bank of Worcester (the new consolidated bank) filed what purported to be the first and final account (R. 8-9) of the Fitchburg Bank and Trust Company, as executor of the said will of Julia A. Legnard, for an accounting period beginning April 21, 1926, and ending February 9, 1928. The account bore upon its face (R. 10-11) a statement that "this account is rendered by the Worcester County National Bank of Worcester for said Bank and Trust Company to June 27, 1927, and thereafter as its own account," and was signed "Worcester County National Bank of Worcester by C. A. Evans, Vice President and Trust Officer, successor to the Fitchburg Bank & Trust Company" (R. 11). The First Probate Judge for the County of Worcester found (R. 12) that the account was in proper form for allowance, and should be allowed as rendered if the said Worcester County National Bank, as successor or otherwise, is executor of said will or has the right to render said account. Without action on the said account (R. 13), the Probate Judge reported the above facts and the question of law involved for the determination of the Full Court of the Supreme Judicial Court of the Commonwealth of Massachusetts (R. 10-14), for decision of the question

whether the petitioner (the appellant in this Court) was entitled to render said account. On May 24, 1928, by a rescript (R. 14), accompanied by an opinion (R. 15-30), the Supreme Judicial Court instructed the Probate Court that the petitioner was not entitled to render said account. Thereafter, on June 14, 1928, the Probate Court for the County of Worcester entered a final decree after rescript (R. 10) dismissing the petition for allowance of the account. No appeal to any state court lies from this decree, and the Probate Court for the County of Worcester is, therefore, under the law of the Commonwealth of Massachusetts, the highest state court in which a final decision in this cause could be reached. The appellant bank duly filed a petition for an appeal to this Honorable Court (R. 31), assigning errors in the action of the Supreme Judicial Court of the Commonwealth in instructing the Probate Court to dismiss the petition for the allowance of the account and in the action of the Probate Court in obeying the rescript of the Full Court of the Supreme Judicial Court (R. 31-33). The appeal was duly allowed upon the filing of bond, without surety, in the sum of one hundred dollars (R. 33).

ANALYSIS OF OPINION OF SUPREME JUDICIAL COURT OF MASSACHUSETTS.

The opinion of the Full Court of the Supreme Judicial Court of Massachusetts was based upon the following chain of reasoning:

1. Although the statutes of Massachusetts do not affirmatively authorize the consolidation of a trust company organized under Massachusetts laws with a national bank, such a consolidation (as authorized by §1 of the Act of Congress of February 25, 1927, c. 191, §3, 44 STAT. AT L., pt. 2, 1224, 1225) is not in and of itself in contravention of the laws of Massachusetts (R. 16-19).

2. The consolidation authorized by said section (*supra*, p. 3) results in the termination of the Fitchburg Bank and Trust Company as a corporate entity created by the laws of Massachusetts capable of transacting business. The consolidated bank is a national bank existing solely by virtue of the charter of the pre-existing national bank party to the consolidation (R. 19-21). The trust company, as a corporate person having individual corporate identity, ceased to exist upon the consummation of the consolidation.

3. Since the corporate identity of the Fitchburg Bank and Trust Company terminated at the time the consolidation took place, its identity as a fiduciary appointed by the Probate Court has been extinguished. Whatever may be the rights, obligations, privileges, immunities, and duties of the consolidated national bank with respect to the ordinary commercial and contractual interests of the Fitchburg Bank and Trust Company, they do not extend to any continuation of the fiduciary interests and duties of the trust company without further action by the Court appointing the trust company as fiduciary. Executors are officers of the Probate Court appointed by the Court in the exercise of its judicial function, as the result of a determination of fitness required by the laws of Massachusetts. In view of the highly personal nature of the trust, the Worcester County National Bank cannot be said to be the executor originally appointed (R. 21-24).

4. Said section (Act of Congress of February 25, 1927, §1, c. 191, §3, 44 STAT. AT L., pt. 2, 1224, 1225), in so far as it provides that the consolidated bank, a national banking association, shall enjoy "the right of succession as trustee, executor, or in any other fiduciary capacity in the same manner and to the same extent as was held and enjoyed by such State . . . bank," is by its clear language an attempt by Congress to require the Probate Court to recognize the consolidated bank as the executor originally appointed, de-

spite the many substantial changes in corporate aspect and personality wrought by the consolidation (R. 24-25).

5. Said section (*supra*, p. 3) as thus construed is in contravention of the law of Massachusetts, inasmuch as it purports to compel the Probate Court to recognize as a fiduciary without new judicial proceedings a corporation different from the corporation originally appointed as such fiduciary (R. 25-27).

6. Said section (*supra*, p. 3) as thus construed (R. 24-25; *supra*, p. 8) is unconstitutional because—

(*a*) it results in the exercise of a judicial function by a legislative body;

(*b*) it constitutes action by Congress outside the scope of its constitutional powers, *i.e.*, by a direct regulation of the administration of estates, clearly a matter within the exclusive jurisdiction of the States;

(*c*) it constitutes Congressional action which goes far beyond any safeguard required to prevent discrimination against national banks in favor of competing state banks (R. 27-29).

7. The purpose of the provision of said section, thus held invalid, is subordinate to the main purpose of the section (which is to provide an easy method of effecting direct consolidations of state banks and national banks). The invalid portion of the section is, therefore, separable (R. 29).

8. The consolidation effected in pursuance of the section is not in contravention of the law of Massachusetts. The consolidation, because of the unconstitutionality of a portion of the section, does not have the effect of entitling the consolidated bank to succeed to the position of executor held previously by the Fitchburg Bank and Trust Company, without petition to the Probate Court by the new consolidated national bank (the appellant) for appointment to the fiduciary position of administrator *de bonis*

non cum testamento annexo of the estate of Julia A. Legnard, late of Fitchburg (R. 30).

POINTS AND AUTHORITIES.

I.

THE ACT OF FEBRUARY 25, 1927, §1 (44 STAT. AT L., PT. 2, 1224, 1225), REQUIRES ONLY THAT A NATIONAL BANK, WITH WHICH A STATE BANK OR TRUST COMPANY HAS BEEN CONSOLIDATED UNDER THE PROVISIONS OF THE ACT, BE APPOINTED AS SUCCESSOR TO THE STATE BANK AS FIDUCIARY IN ACCORDANCE WITH THE RULES OF STATE LAW APPLICABLE TO SUCH APPOINTMENTS. SO LONG AS THE STATE LAW APPLICABLE TO THE APPOINTMENT OF SUCCESSOR FIDUCIARIES PROVIDES FOR THE APPOINTMENT OF CONSOLIDATED NATIONAL BANKS AS SUCCESSOR IN THE SAME MANNER AND UPON THE SAME TERMS AS CONSOLIDATED STATE BANKS, THE STATE LAW AND §1 OF THE ACT OF FEBRUARY 25, 1927, ARE NOT IN CONFLICT.

A. *A Construction of §1 of the Act of February 25, 1927, should be Avoided, which would Render a Portion of the Section of Doubtful Constitutionality.*

The Chief Justice of the Supreme Judicial Court of Massachusetts construed section 1 of the Act of February 25, 1927 (quoted, *supra*, p. 3), as purporting to require the Probate Courts of a State to recognize a national bank with which a state bank or trust company had been consolidated (as authorized by the act) as successor as fiduciary to the state bank or trust company in all fiduciary positions to which the state bank had previously been appointed by the Probate Court. The Chief Justice indeed construed the act to require the recognition of the consolidated bank as successor fiduciary without further action by the Probate Court, even though the law of Massachusetts provided that a successor fiduciary should be appointed only after peti-

tion to the Court by the candidate for appointment as successor, and after determination by the Court (as a matter of judicial inquiry) that the candidate was a suitable person for the position of successor fiduciary (R. 24-25; see analysis of opinion, *supra*, p. 8). This construction was the one contended for by the present appellant (petitioner below) in its brief and argument before the Supreme Judicial Court of Massachusetts and it is apparently its interpretation of the construction taken by the Comptroller of the Currency in an opinion, quoted extensively in the brief below. (See opinion of Comptroller of the Currency, dated March 22, 1927, published Fourteenth Annual Report of the Federal Reserve Board, 1927, pp. 267-271). There was no argument or brief in the Supreme Judicial Court for any respondent. [The persons here represented made no request to be heard as parties in interest in the proceedings in the state court.] The Supreme Judicial Court did not have at its disposal argument in favor of any other construction of section 1 of the Act of February 25, 1927 (quoted, *supra*, p. 3. This section amends the Act of November 7, 1918, by inserting a new section, section 3 thereof. The section is referred to in the opinion of the Supreme Judicial Court of Massachusetts as section 3). Despite the exhaustive examination by the Court of the pertinent authorities, it is submitted with great deference that the construction by the Court of section 1 was incorrect. Inasmuch as the statute construed is an Act of Congress, it is obvious that this Honorable Court is not bound by the construction taken by the Supreme Judicial Court of Massachusetts.

Pacheco v. *N.Y., N.H. & H. R. Co.*, 15 F. (2d) 467, 468 (C.C.A. 2d).
Knight v. *Carter Oil Co.*, 23 F. (2d) 481, 484.

As we have stated above (*supra*, p. 9), the Supreme Judicial Court, having thus construed the statute, held

that section 1 was in violation of the Constitution of the United States in so far as it required a state court without a new judicial determination to recognize as a trustee or other successor fiduciary a consolidated national bank in place of a trust company originally appointed to the trust by the Court. It is, of course, necessary for this Honorable Court to review the correctness of the decision of the Massachusetts Court on the question of constitutionality, if this Court adopts the construction of section 1 taken by the Massachusetts Court. In view of the decision below, it must be said at least that there is grave doubt as to the constitutional validity of a portion of section 1 as construed by the Supreme Judicial Court. We submit, therefore, that this Court should be astute to adopt (as between a statutory construction which raises strong doubts as to the constitutionality of an act of Congress and another construction which renders the statute unquestionably valid) the construction which leaves no room for any holding or argument that the legislative department has exceeded its powers.

Richmond Screw Anchor Company v. *United States*, 275 U.S. 331, 346.
Blodgett v. *Holden*, 275 U.S. 142, 148.

It is the contention of these respondents that section 1, as applicable to this case, should be construed so as—

(1) To permit the Probate Court to exercise a judicial determination in the particular case before it as to the fitness of the consolidated national bank to succeed as fiduciary a state trust company which has been consolidated with the national bank under section 1;—that is, in this case, to permit the Worcester County Probate Court to decide whether the Worcester County National Bank of Worcester is a fit and suitable person to succeed the Fitchburg Bank and Trust Company as executor of the will of Julia A. Legnard.

(2) To permit the Probate Court to decline to acknowledge as fiduciary or as its officer a consolidated national bank, where such a bank has not applied for appointment as fiduciary to succeed a state trust company in accordance with the requirements of state law as to all successor fiduciaries;—that is, in the case at bar, to permit the Probate Court of Worcester County to decline to recognize the Worcester County National Bank of Worcester as executor in the place of the Fitchburg Bank and Trust Company, inasmuch as the appellant has not applied for appointment as administrator *de bonis non cum testamento annexo* in the place of said trust company.

(3) To permit the state Probate Court to visit upon a consolidated bank the consequences (imposed by state law) of dealing with the assets of an estate in process of administration and therefore assets *in custodia legis* without being a fiduciary appointed and authorized by the Court so to do;—that is, in the case at bar, to permit the Worcester Probate Court to refuse to allow the appellant national bank to account as *executor*. It is the contention of the Commonwealth that the appellant should be permitted to account only as executor *de son tort*, as would be the case if any other person (whether individual or corporation) improperly and without authority intermeddled with the assets of the estate.

B. *The Language and Legislative History of Section 1 of the Act of February 25, 1927, does Not Indicate that Congress Intended to Authorize Consolidated National Banks to Succeed State Trust Companies as Fiduciaries without New Appointment by the Probate Court, where State Law Requires such New Appointment.*

1. *The Legislative History of Section 1 of the Act of February 25, 1927, Shows that it was Intended only to Simplify the Procedure Attendant upon the Consolidation of State and National Banks.*

The Act of February 25, 1927 (44 STAT. AT L., pt. 2, 1224, 1225), with section 1 of which this case is concerned, was designed to provide for consolidations of state banks and national banks under the charter of a national bank and purported "to amend an Act entitled 'An Act to provide for the consolidation of national banking associations' approved November 7, 1918." The general purpose of the bill (69th Congress, 1st Sess., H.R. 2) is explained fully in the report made by the chairman of the House Committee on Banking and Currency in behalf of the committee (69th Congress, 1st Sess., House of Representatives, Report No. 83, January 12, 1926) in the following language:

> "Every section of the bill is an amendment of the national bank act itself or of provisions of the Federal reserve act which relate to national banks. The general purpose of the bill is to adjust the national banking laws to modern banking conditions along the lines of conservative banking, and without any deviation from the high standard which has been set by the national banking system. Some of the provisions in the bill extend and enlarge the powers of national banks, but only in the manner in which State banks and trust companies generally have been successfully operating within recent years. Other sections of the

bill affirm and regulate practices which have grown up within the national banking system under the exercise of incidental corporate powers. These practices are common to both the State and national banks. Other sections of the bill relate entirely to questions of procedure and not to banking powers. An attempt is made to eliminate some of the rigid formalities in this direction. Several sections of the bill declare a Federal Governmental policy with reference to branch banking. A detailed analysis section by section follows:

"Section 1: This section relates to a question of procedure. It adds no new power to the national banks. It provides that a State bank may consolidate directly with a national bank under the national charter. The same result can now be accomplished through the State bank first converting into a national bank and then consolidating with another national bank. Consequently, the effect of the section is to eliminate delay and expense in accomplishing a result which is already provided for by law."

It is a fair statement of the situation to say that the portions of the act, as finally approved, dealing with branch banking received by all odds the most attention from the Congress in committee and in debate. The questions of policy involved in that respect were fully discussed to the practical exclusion of discussion of the portions of section 1 of the bill pertinent in this case. As stated in the committee report just quoted, section 1 was primarily for the purpose of simplifying procedure in the consolidation of state banks with national banks under the charters of the latter; and it is submitted that no startling disregard of fundamentals of state law with respect to the administration of estates by state courts can be read into the Con-

gressional intention as revealed by the words of the act or its legislative history.

The precise words of section 1 of the Act of February 25, 1927, over which this case is fought, are the following (lines 30 to 41 on page 1225 of the act as printed in 44 STAT. AT L., pt. 2):

30 ". . . . . and all the rights, franchises,
31 and interests of such State or District bank so consolidated with a
32 national banking association in and to every species of property,
33 real, personal, and mixed, and choses in action thereto belonging,
34 shall be deemed to be transferred to and vested in such national
35 banking association into which it is consolidated without any deed
36 or other transfer, and the said consolidated national banking asso-
37 ciation, shall hold and enjoy the same and all rights of property,
38 franchises, and interests *including the right of succession as trustee,*
39 *executor, or in any other fiduciary capacity* in the same manner and
40 to the same extent as was held and enjoyed by such State or District
41 bank so consolidated with such national banking association."

The italicized language (italics ours) in the quotation above did not appear in the original bill, nor was it in the bill as reported by the House Committee on Banking and Currency on January 12, 1926 (*Congressional Record*, vol. 67, pt. 2, p. 1935; see House Report, No. 83, 69th Congress, 1st Sess.). The italicized language did not appear in the bill as reported with amendments by Senator *Pepper* for the Senate Committee on Banking and Currency on March 25, 1926 (*Congressional Record*, vol. 67, pt. 6, p. 6215; Senate Report No. 473, 69th Congress, 1st Sess.). The language first appears in an amendment offered in behalf of the Senate Committee on Banking and Currency by Senator *Edge* from the floor of the Senate on May 12, 1926, when the Senate Committee report with amendments was considered. The following took place at that time (*Congressional Record*, vol. 67, pt. 8, p. 9288), the amendment being approved without discussion.

> "Mr. Edge. Mr. President, on behalf of the committee I desire to offer an amendment at this point.

"The Presiding Officer. The amendment will be stated.

"The Chief Clerk. On page 3, line 18, after the word 'interests,' it is proposed to insert the following: including the right of succession as trustee, executor, or in any other fiduciary capacity.

"Mr. Edge. Mr. President, this amendment is merely to clarify the section and make its intent easier to understand.

"The Presiding Officer. The question is on agreeing to the amendment offered by the Senator from New Jersey on behalf of the committee.

"The amendment was agreed to."

This amendment of the Senate (numbered 5 in the reprint of the amended bill, as returned to be printed with Senate Amendments on May 14, 1926, to the House of Representatives, *Congressional Record*, vol. 67, pt. 9, p. 9450, and thereafter referred to as No. 5 in the *Congressional Record*), was mentioned thereafter with comment only twice in the *Congressional Record* so far as we have been able to discover:

(*a*) The House members of a conference committee of the two houses on H.R. 2, the bill in question, in a statement annexed to the conference report filed June 22, 1926 (*Congressional Record*, vol. 67, pt. 11, pp. 11,765-11,766), said, as to amendment No. 5:

"On No. 5: The Senate amendment provides that in case of a consolidation of a national bank with a State bank that the consolidated bank should enjoy, among other property rights, franchises, and interests of the constituent banks, the right of succession as trustees, executors, or in any other fiduciary capacity. The House bill had no provision on the subject and the House recedes."

(*b*) Mr. McFadden, in commenting on the conference report in behalf of the House Committee in debate (*Congressional Record*, vol. 67, pt. 11, p. 11,767), said:

> "Amendment No. 5 clarifies the language of the House bill as to the right of a consolidated bank to act as trustees, etc."

It is hard to find in the language of the section inserted by Senate Amendment No. 5, when read in the light of this statutory history, any expression of a legislative intention making inapplicable to consolidated national banks the requirements of the laws of the several States with respect to the appointment by Probate Courts of executors and trustees or of successors to fiduciaries already appointed. In fact, every provision of the Act of February 25, 1927, reveals a clear desire on the part of Congress to refrain from interfering with provisions of state law beyond making provision for the conduct of the banking business by national banks (including those with which state banks have been consolidated) on terms of even competition with state banks authorized by law to do a similar business. There is no apparent intention that national banks (whether or not parties to a consolidation with state banks) shall have greater privileges than their state bank competitors; nor does it appear that Congress (assuming that it has the power to do so) intended to deny to state courts the power to regulate the fiduciary business conducted by a national bank, where such state court had the power under state laws to pass upon the conduct by a state bank or trust company of fiduciary business under similar circumstances.

2. *The Language of the Whole of Section 1 of the Act of February 25, 1927, Indicates that Congress did Not Intend that the Consolidation Authorized by Section 1 should Result in Any Violation of State Laws.*

Evidence of a deferential regard for state laws, enacted within the scope of the constitutional powers of state legislatures, is to be found in the whole statute. The following language of the act is referred to as indicating the general legislative intention, in the light of which the language here under consideration should be construed under the long-established rule that the intention of the lawmaker is to be deduced from a view of every material part of the statute.

Hellmich v. *Hellman*, 276 U.S. 233, 237.

(*a*) Express provision is found in section 1 of the Act of February 25, 1927, that no consolidation taking place under the provisions of the section "shall be in contravention of the law of the State in which such bank is incorporated" (44 STAT. AT L., pt. 2, p. 1226). Here Congress deliberately limits the operation of the most important feature of the section to consolidations in which the state banks concerned are permitted to participate under the law of their State. Such a limitation is in accord with the general intention (which we contend is apparent in the statute) that general provisions of state law were not to be set aside in order to carry out the purpose of the act.

(*b*) The express provision of section 1 (44 STAT. AT L., pt. 2, p. 1225, top) that a consolidation shall be approved by the vote of two thirds of the stockholders of the state bank involved "or by a greater proportion of such capital stock of such State bank if the laws of the State where the same is organized so require," is consistent with the general intention which we claim exists.

(*c*) Provision for notice to stockholders of the state bank of meetings is made by section 1 in close conformity with

the applicable provisions of state law, and then out of excess of deference for the provisions of state law is added, —"but any additional notice shall be given to the shareholders of such State bank which may be required by the laws of the State where the same is organized."

(*d*) Liquidation of shares of stock of a state bank is by section 1 to "be determined in the manner prescribed by the law of the State in such cases if such provision is made in the State law; otherwise as" provided in the section (44 STAT. AT L., pt. 2, p. 1226, top).

Instances could be cited in the other sections of the Act of February 25, 1927, bearing out the general intention which we contend must be taken into account in considering the precise language of section 1 here under discussion.

E.g. The many provisions of section 7 (44 STAT. AT L., pt. 2, p. 1228) which are referable to the provisions of the law of the State where the national bank in any particular instance does business.

3. ***The Statutes under which National Banks are Authorized to Act as Fiduciaries by State Court Appointment do Not Purport to Relieve National Banks from Court Supervision to which State Banks acting as Fiduciaries are Subjected. Section 1 of the Act of February 25, 1927, should be Construed so as to be Consistent with the Earlier Legislation.***

National banks were originally authorized to act as fiduciaries, in States in which state banks were by law permitted so to act, by the provisions of the Federal Reserve Act of 1913; Act of December 23, 1913, c. 6, §11 (*k*), 38 STAT. AT L., pt. 1, p. 262, which reads:

> "The Federal Reserve Board shall be authorized and empowered:
>
> . . . . . .

(*k*) To grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds under such rules and regulations as the said board may prescribe."

The constitutionality of this section was upheld by this Honorable Court in—

First National Bank of Bay City v. *Fellows, Attorney General of Michigan, ex rel. Union Trust Company*, 244 U.S. 416.

The effect of the section upon non-discriminatory provisions of state law regulating the administration of estates was discussed by Mr. Chief Justice *White* in the following language, at pp. 426-427:

"Of course as the general subject of regulating the character of business just referred to is peculiarly within state administrative control, state regulations for the conduct of such business, if not discriminatory or so unreasonable as to justify the conclusion that they necessarily would so operate, would be controlling upon banks chartered by Congress when they came in virtue of authority conferred upon them by Congress to exert such particular powers. And these considerations clearly were in the legislative mind when it enacted the statute in question. This result would seem to be plain when it is observed (a) that the statute authorizes the exertion of the particular functions by national banks when not in contravention of the state law, that is, where the right to perform them is expressly given by the state law or what is equivalent is deducible from the state law because that law has given the functions to state banks or corporations

whose business in a greater or less degree rivals that of national banks, thus engendering from the state law itself an implication of authority in Congress to do as to national banks that which the state law has done as to other corporations; and (b) that the statute subjects the right to exert the particular functions which it confers on national banks to the administrative authority of the Reserve Board, giving besides to that Board power to adopt rules regulating the exercise of the functions conferred, thus affording the means of coördinating the functions when permitted to be discharged by national banks with the reasonable and non-discriminating provisions of state law regulating their exercise as to state corporations,—the whole to the end that harmony and the concordant exercise of the national and state power might result."

Section 11 (*k*) of the Federal Reserve Act was considerably expanded by the amendment contained in section 2 of the Act of September 26, 1918 (40 STAT. AT L., pt. 1, pp. 968-969. U.S. Code, tit. 12, c. 3, §248 (*k*). This act is so long that it is printed in Appendix A, *infra*, pp. 71 to 73). The amended section was held valid in—

Burnes National Bank v. *Duncan*, 265 U.S. 17—

and was construed as requiring a Probate Court, in a State which permitted state banking corporations to act as fiduciaries, to appoint national banks to similar positions of trust upon proper petition upon the same terms and in like situations without discrimination against national banks. The case did not discuss the question of the validity of non-discriminatory state regulation through the Courts of the performance of fiduciary duties by national banks and state trust companies. The purpose of Congress in this respect is abundantly clear from the committee reports and from the debates on the floor of the House of Representa-

tives. The report of the House Committee on Banking and Currency under date of April 9, 1918 (65th Congress, 2d Sess., House Rep. No. 479), on the proposed act (H.R. 11,283) describes the amendment in the following terms at pp. 2-3:

> "The terms of section 11 (k) are extended, therefore, to permit such powers to be granted to national banks in those States in which the State law discriminates against national banks in this respect.
>
> "Under this amendment, furthermore, it is prescribed that all assets held in any fiduciary capacity shall be segregated from the general assets of the bank; that a separate set of books and records shall be kept; that such books and records shall be open to the inspection of State authorities; that national banks shall not receive in their trust departments deposits of current funds subject to check or the deposit of checks, drafts, or similar instruments; that trust funds deposited with the general assets of the bank shall be properly secured; that the owners of such funds shall have a lien on the securities set apart to protect these funds; that national banks acting as fiduciaries shall comply with State requirements as to the deposit of securities with the State authorities; that national banks shall not be required to execute bonds if State corporations under similar circumstances are exempt from such requirement; that national banks shall have the power to execute such bonds; that oaths or affidavits required may be executed by a national bank officer; and that it shall be unlawful for a national bank to lend trust funds to any bank officer, director, or employee. The Federal Reserve Board, moreover, in passing upon applications is required to take into consideration the amount of capital and surplus of the applying bank and other material facts, and is prohibited from granting such permits to national banks

of smaller capitalization and surplus than is required of State banking institutions under State law. These provisions are intended to impose safeguards upon the exercise of these fiduciary powers by national banks, and to have national banks in the exercise of these powers conform as fully as is practicable with State requirements."

The language of the report makes it abundantly clear that the grant to national banks of power to act as a fiduciary was intended to subject national banks to the requirements of state law regulating the conduct of trusts on an even basis with state bank competitors. Only such provisions of state law as discriminate against national bank fiduciaries in favor of state bank fiduciaries come in conflict with section 11 (*k*), as amended. That this is true is apparent from the language of Mr. *Phelan*, explaining the report in behalf of the committee on the floor of the House (April 24, 1918; *Congressional Record*, vol. 56, pt. 6, pp. 5576-5578). At page 5577, in answering a question, Mr. *Phelan* (a representative from Massachusetts) described the control in the probate court of estates being administered by national banks in the following terms:

"I will call the gentleman's attention to this fact, that the probate court judge or other judge having jurisdiction is supreme master of the situation. If the national bank endeavors to do anything which he thinks is in violation of the trust, he has absolute power to remove that national bank as trustee and appoint any other trustee in his place. All that we are doing by the law is to say that the Federal Reserve Board may enable these banks to act as trustees; but we do not, and, in my own opinion, I think probably we can not say that the national bank could be made a trustee or continued as a trustee if the probate judge

having charge of the estate, or other judge, as the case may be, thought that the national bank was not properly executing its trust, so that the probate or other court is absolute master, in the final analysis."

It is submitted that section 1 of the Act of February 25, 1927, granting fiduciary powers to consolidated national banks as successor to state trust companies having such powers, must be construed as a grant of power of similar import and extent to that given to national banks holding Federal Reserve powers under section 11 (*k*) of the Act of September 26, 1918. Construction of section 1 of the Act of February 25, 1927, in the light of the general grant of power authorized by section 11 (*k*) of the 1918 act is warranted by the familiar doctrine that legislation is to be construed in the light of the general legislative declaration of public policy as established and settled by pre-existing statutes on the same subject.

United States v. *Sweet*, 245 U.S. 563, 567.

The propriety of reference to Congressional committee reports and to explanatory statements in the nature of a supplemental report by the committee member in charge of a bill in course of passage is well settled.

Duplex Company v. *Deering*, 254 U.S. 443, 474-475.

Wisconsin R.R. Commission v. *C., B. & Q. R.R. Co.*, 257 U.S. 563, 589.

Cf. Everard's Breweries v. *Day*, 265 U.S. 545, 561.

It is, therefore, our contention that the grant of power (through section 1 of the Act of February 25, 1927) to national banks to succeed state banks (component members of a consolidation with the national bank in question) as fiduciaries is merely a grant of power subject to the non-

discriminatory provisions of state law regulating the conduct of estates by fiduciaries. It becomes necessary to discover, therefore, whether the provisions of Massachusetts probate law pertinent to this case are of general application to national banks and trust companies alike, or whether they are in any sense discriminatory in favor of state institutions to the detriment of national banks. We submit that the rules of probate procedure in Massachusetts governing the present situation are general in their scope, and that they apply to all persons (corporations or individuals) who wish to act in a fiduciary capacity as successor to another person who has ceased to carry out a trust although originally appointed fiduciary in the particular estate by the Court.

4. *The Pertinent Provisions of Massachusetts Law Governing the Conduct by Fiduciaries of Estates under Direction of a Massachusetts Court in No Sense Discriminate against National Banks in Favor of any Other Person.*

The General Laws of Massachusetts of 1921 (hereinafter cited G.L.), c. 192, §4, reads as follows:

> "If a will has been duly proved and allowed, the probate court shall issue letters testamentary thereon to the executor named therein, *if he is legally competent and a suitable person* and accepts the trust and within thirty days gives bond to discharge the same; otherwise said court may grant letters of administration on the estate as provided in the following chapter."

(Italics ours. G.L., c. 193, §7, as amended by St. 1921, c. 64, is quoted in Appendix B, *infra*, p. 74. This section governs original appointments of administrators with the will annexed.)

Under section 4 it has been held that the Probate Court, within a sound judicial discretion, "has the power to refuse to appoint an executor named by the testator if he is incapable of performing the trust, or is unsuitable. It can remove such a person, although duly appointed; and it can refuse, upon adequate evidence, to appoint him if satisfied he is for any reason unsuitable."

Osborne v. *Craig*, 251 Mass. 169, esp. at pp. 172-173.
Cogswell v. *Hall*, 183 Mass. 575, 576-577.

The Massachusetts law is stated in similar fashion by Mr. Chief Justice *Rugg* in the opinion below in the case at bar, 1928 Mass. Adv. Sh. 1213, 1221 (R. 23), where the following language appears:

> "The suggestion in the brief of the petitioner that, 'strictly speaking, a court cannot appoint an executor,' is without merit in this connection. Probate courts are required to find that a person named as executor 'is legally competent and a suitable person' before issuing letters testamentary. G. L. c. 192, §4. The form of letter testamentary in common use by probate courts and doubtless approved by this court under G.L. c. 215, §30, begins with the assertion, after naming the person, 'You are appointed executor.' He has no legal authority as executor until so appointed. Manifestly the executor is appointed by the court as the result of a judicial decision."

(The cases of *Parker* v. *Sears*, 117 Mass. 513, and *National Bank* v. *Eldridge*, 115 Mass. 424, cited in the appellant's brief, p. 37, must be taken to have been superseded and discredited by the later cases, so far as they indicate in any degree that the probate court does not in fact *appoint* executors upon *nomination* of the testator.)

That the decision of the highest court of a State as to the construction of a *statute passed by the legislature of the same State* will be accepted by this Honorable Court is well settled.

Chicago, Milwaukee, St. P. & P. R.R. Co. v. *Risty*, 276 U.S. 567, 570.
Saltonstall v. *Saltonstall*, 276 U.S. 260, 270.

It must be taken as settled in this case that the Massachusetts law requires the Probate Court to make a judicial determination of the fitness of any executor appointed by it to administer an estate as an officer of the Court. A similar determination of suitability is required by statute and by judicial decisions (resting in part, at least, on common-law principles) in the case of the appointment of a successor to an executor who has ceased to carry out his trust.

G.L., c. 192, §8, provides:

> "The executor of the will of an executor shall not, as such, administer on the estate of the first testator."

G.L., c. 193, §9, provides:

> "If a sole or surviving executor or administrator dies, resigns or is removed before having fully administered an estate, and there is personal property of the deceased not administered to the amount of twenty dollars, or debts to that amount remaining due from the estate, or anything remaining to be performed in execution of the will, or if there is an order of distribution in accordance with section twenty-eight of chapter two hundred and six, the probate court shall grant letters of administration, with the will annexed, or otherwise as the case may require, to one or more suitable persons to administer the goods and estate of the deceased not already administered. If it appears that

there are no known heirs of the deceased, a public administrator of the county shall be appointed to the trust."

In *Davis, petitioner*, 237 Mass. 47, 49-50, Mr. Chief Justice *Rugg*, speaking for the Court, construes these sections and defines the words "suitable persons," as found in G.L., c. 193, §9 (dealing with the appointment of administrators *de bonis non* with the will annexed), in the following language, which is equally pertinent with respect to the word "suitable," in G.L., c. 192, §4 (dealing with the original appointment of executors, quoted *supra*, p. 26).

> "It is provided by G.L. c. 193, §9, that under circumstances like those here disclosed the Probate Court shall grant letters of administration with the will annexed to administer the remaining estate 'to one or more suitable persons.' The words 'suitable persons' have no statutory or other fixed and inflexible meaning in this connection. Their context in connection with the history of the statute shows that they were intended to confer a wide discretion upon the Probate Court. They authorize the appointment of the person or persons who appear in the exercise of sound and discerning judgment in the light of all the circumstances of the particular case to be best equipped by temperament, experience and sagacity to discharge the trust with fidelity, prudence and promptness. The appointee should be a fitting person having regard to the special conditions of each estate and those interested in it as creditors, legatees, and next of kin. Suitableness is capacity founded on the innate and acquired qualities of the particular person in his relation to the situation of the estate to be administered, and to those directly and indirectly to be affected by the settlement of the estate. Attention may be given to per-

sonal characteristics and to all the other causes, not easily susceptible of enumeration, rationally affecting a judicious selection."

See *Boynton* v. *Foss*, 238 Mass. 574, 576.
Cf. Martin v. *Otis*, 233 Mass. 491, 496.

(The case of *Frein* v. *Agricultural National Bank of Pittsfield*, 1927 Mass. Adv. Sh. 1809, does not represent the present state of the Massachusetts law. The opinion in that case was recalled after rehearing and the decision of the Probate Court was affirmed without an opinion by an evenly divided court, one judge being disqualified. See supplemental insert to 261 Massachusetts Reports).

See NEWHALL, SETTLEMENT OF ESTATES IN MASSACHUSETTS, 2 ed., §§ 14, 15, 29, 30, esp. pp. 40, 43.

Trust companies may be appointed to positions of trust as officers of the court by the Massachusetts courts having jurisdiction (the Probate Court for the proper county in the case of a trust connected with the administration of the estate of a deceased person) by virtue of the provisions of G.L., c. 172, §52 (since this case arose, amended by St. 1928, c. 128, §2, which, though not pertinent here, permits national banks and trust companies having a principal place of business outside Massachusetts to qualify before the State Board of Bank Incorporation to act as fiduciaries in Massachusetts). The section, in which the words "such corporation" refer to a trust company incorporated under G.L., c. 172, prior to the 1928 amendment, reads:—

"Such corporation may be appointed executor of a will, codicil or writing testamentary, administrator with the will annexed, administrator of the estate of any person, receiver, assignee, guardian, conservator

or trustee under a will or instrument creating a trust for the care and management of property, *under the same circumstances, in the same manner, and subject to the same control by the court having jurisdiction of the same, as a legally qualified individual.* Any such appointment as guardian shall apply to the estate and not to the person of the ward. Such corporation shall not be required to receive or hold property or money or assume or execute a trust under this section or of section fifty without its assent." (Italics ours.)

These and other pertinent provisions (G.L., c. 172, §§ 49-59, and all amendments thereto are printed in Appendix C, *infra*, pp. 75 to 78) were considered by the Supreme Judicial Court at length in—

Commonwealth-Atlantic National Bank, petitioner, 249 Mass. 440, 445, 447, *et seq.* (Certiorari denied, 266 U.S. 617, by memorandum without opinion.)

It is clear from the opinion in that case that the Massachusetts court regards a state trust company as standing upon the same basis as an individual with respect to supervision by the Court, when serving as a fiduciary by appointment of a Massachusetts court. The following cases are to the same effect:

See *Atlantic National Bank, petitioner*, 261 Mass. 217, 220.

Old Colony Trust Co. v. *Wallace*, 212 Mass. 335, 336-337.

Cf. Guaranty Trust Co., petitioner, 248 Mass. 319, 321.

In the following two recent Massachusetts cases a specific application to trust companies by the Probate Court

of the rules pertinent to individual trustees in the conduct of their trusts was approved.

State Street Trust Co. v. *Walker*, 259 Mass. 578.
Boston Safe Deposit & Trust Co. v. *Wall*, 254 Mass. 464, 468-469.

In the very recent case of *Boston Safe Deposit & Trust Co.* v. *Taylor*, 262 Mass. 287; 159 N.E. 619, the question of the "suitability" of a trust company for appointment as trustee was carefully considered. In that case, the Supreme Judicial Court upheld the action of the Probate Court in appointing the trust company.

Consolidation of Massachusetts trust companies now takes place under general act.

G.L., c. 172, §44, as amended by St. 1922, c. 292, reads:

> "No trust company shall be merged in or consolidated with another trust company except with the written approval of the commissioner and under the provisions of sections forty-two and forty-six of chapter one hundred and fifty-six, which are hereby made applicable to the sale or exchange of all the property and assets, including the good will and corporate franchise, of a trust company. The charter of a trust company the business of which shall, on or after July first, nineteen hundred and twenty-two, be consolidated or merged with, or absorbed by, another bank or trust company, shall be void except for the purpose of discharging existing obligations and liabilities."

G.L., c. 156, §§ 42 and 46, referred to in the above section, merely cover requirements of stockholder authorization of changes in the capital structure of companies and the method of valuing the shares of non-participating minority stockholders (see *infra*, pp. 79-80, Appendix D).

By G.L., c. 172, §44, as amended, *supra*, it is expressly provided that the charters of trust companies

merged in, absorbed by, or consolidated with "another bank or trust company" shall be void except for the purpose of discharging existing obligations and liabilities. This section has been construed by the Supreme Judicial Court of Massachusetts only in the case at bar. (1928 Mass. Adv. Sh. 1213, 1217-1218; R. 15, 17-18, 20). At pp. 1217-1218 (R. 20) the Court says:

> "The words of said §3 (44 U.S. Sts. at Large, Part II, 1225, 1226) are explicit to the point that the consolidation shall be 'under the charter of such national banking association.' This of itself is clear indication of intent that the State trust company shall not continue as a corporation in combination with the national bank. The words of St. 1922, c. 292, amending G.L. c. 172, §44, are equally explicit that upon any consolidation of a Massachusetts trust company, whether with a bank or another trust company, its charter 'shall be void except for the purpose of discharging existing obligations and liabilities.' The statutes of this Commonwealth upon the subject of a trust company, owing its creation and existence exclusively to those statutes, must be valid and binding to this extent. The later provision of said §3 that there shall be transferred to the national banking association and be held by it among other things the 'franchise' of the State bank, cannot mean its right to be a corporation. The right to transfer franchise powers of a corporation organized under the laws of one sovereignty to a corporation organized under the laws of a different sovereignty is extraordinary. It cannot be implied in the absence of explicit statutory enactment to that end. There is no such provision in the statutes of this Commonwealth. Any other conclusion would be in contravention of the laws of this Commonwealth. It is manifest from the terms of said §3 (44 U. S. Sts. at Large, Part II, 1225, 1226) and from the terms of said St. 1922,

c. 292, that the charter of the trust company here in question became void on the consolidation (except for purposes not here material), and that the only corporation now operative is the national bank. *The trust company as a Massachusetts corporation has ceased to be an institution capable of transacting business.*" (Italics ours.)

It is submitted that the same result would be reached if a Massachusetts trust company were consolidated with another Massachusetts trust company under the charter of the second company. The first company would cease to be capable of conducting business. It would no longer be a competent executor, and under the provisions of G.L., c. 193, §9 (*supra*, p. 28), it would become necessary to appoint some other suitable person to the trust as administrator *de bonis non*. In most cases, no doubt, it would be the merged bank which would be appointed, but under the doctrine announced in *Davis, petitioner*, 237 Mass. 47, 49-50 (*supra*, p. 29), it would be for the Probate Court to determine on suitable petition, in the form appearing in Appendix E (*infra*, p. 81), whether the petitioner was a suitable person. No appointment would be made except by the consent of all persons interested, or after notice by citation in the form appearing in Appendix E (*infra*, p. 81). A form of decree of appointment is also reprinted in that appendix. (The forms printed in Appendix E are those prescribed by Probate Court rule, approved by the Supreme Judicial Court. See G.L., c. 215, §30.)

It is well settled in Massachusetts that positions of trust by appointment of Probate Courts give no personal or pecuniary interest to the fiduciary. The relationship of the fiduciary, both to the court and to the beneficiaries, is strictly one of personal confidence and trust.

See Opinion below, 1928 Adv. Sh. 1213, 1222; R. 24, and cases there cited.

Commonwealth-Atlantic National Bank, petitioner, 249 Mass. 440, 445.

Atlantic National Bank, petitioner, 261 Mass. 217, 220.

In the last-mentioned case the following facts appeared: A trust company, duly appointed by the Probate Court trustee under a will, was converted into a national bank. The national bank then was consolidated with the petitioner in that case, another national bank, under the charter of the petitioner. It was held that the petitioner there was not entitled to account as trustee under the ~~new~~ appointment, as it was a different corporation than the trust company originally appointed trustee. Admittedly, this is not precisely the case which would arise if one Massachusetts trust company consolidated with another under G.L., c. 172, §44 (as amended by St. 1922, c. 292, *supra*, p. 32); but we contend that the reasoning in the opinion below (1928 Mass. Adv. Sh. 1213, 1222; R. 15, 24) and in *Atlantic National Bank, petitioner*, taken together with the Massachusetts statutory and decisional law as to successor fiduciaries, makes the following propositions a fair statement of the Massachusetts law:

(*a*) A Massachusetts trust company does not succeed to the fiduciary appointments from Massachusetts courts held by another Massachusetts trust company which has been consolidated with and merged in it (by G.L., c. 172, §44, as amended by St. 1922, c. 292) without new appointment by the Court to such trusts as successor after suitable petition. (The statement contained in the first paragraph of page 11 of the appellant's brief does not state accurately the law in Massachusetts.)

(*b*) A national bank succeeding another national bank by consolidation under section 2 of the Act of November 7, 1918, c. 209, 40 STAT. AT L. 1044, might conceivably succeed to the fiduciary appointments of the other bank, because

said section 2 apparently provides for the continuation of the corporate identity of both national banks in the merged bank. The precise question has not been decided.

See *Worcester County National Bank, petitioner* (No. 1), 1928 Mass. Adv. Sh. 1195.

[Not the opinion below, but another case holding that the Worcester County National Bank of Worcester might account as the administrator of an estate in which the Merchants National Bank of Worcester had originally been appointed administrator. As will be seen from the record in the case at bar (R. 12-13, 15) and from the statement of facts in this brief (*supra*, p. 3), the Fitchburg Bank and Trust Company and the Merchants National Bank of Worcester were consolidated under the charter of the latter bank, but under the name of the Worcester County National Bank of Worcester. The Supreme Judicial Court held, in the opinion just mentioned (1928 Mass. Adv. Sh. 1195—not the opinion below), that the mere change of name of the national bank originally appointed did not make the consolidated national bank a new corporate entity. After the consolidation and change of name the national bank was held to be still the same national bank under the same charter and, therefore, the same corporation originally appointed administrator by the Probate Court.]

(*c*) A national bank does not succeed to the fiduciary positions held under court appointment by a state trust company which has been consolidated with the national bank under the charter of the latter. (This is the result in the present case as found by the Massachusetts court.)

(*d*) Conversely, on the reasoning of the Massachusetts court, a state trust company which has in any way absorbed the assets of a national bank would not succeed to the fiduciary positions held by such national bank under court appointment.

(*e*) Upon the authority and reasoning of *Worcester County National Bank, petitioner* (No. 1), 1928 Mass. Adv. Sh. 1195 (see *supra*, p. 36), either a national bank or a state trust company would retain trust appointments granted by the Court to it despite the fact that a consolidation with another bank or trust company had taken place *under the charter of the corporation originally appointed* to the trust after the date of the appointment. This holding would be based upon the continuity of the corporate existence of the corporation originally appointed. Of course, if the consolidated bank became unfit to perform its trust by reason of an interest adverse to the beneficiaries arising out of the consolidation, or for any other ground of incompetency, it could be removed as fiduciary by the Court for cause. See G.L., c. 195, §11, which reads:

> "If an executor or administrator becomes insane or otherwise incapable of performing the trust, or is unsuitable therefor, or if an executor or administrator who resides out of the commonwealth, having been duly cited by the probate court, neglects to render his accounts and to settle the estate, the probate court may remove him; and thereupon the other executor or administrator, if any, may proceed in performing the trust as if the one removed were dead or, if there is no other executor or administrator, the court may appoint an administrator as provided in section nine of chapter one hundred and ninety-three."

See *Brackett* v. *Williams*, 116 Mass. 549 (removal of administrator).

Glines v. *Weeks*, 137 Mass. 547 (removal of administrator).

Cf. Wilson v. *Wilson*, 145 Mass. 490 (removal of trustee).

Attorney General v. *Armstrong*, 231 Mass. 196, 214 (removal of trustee).

A careful examination of the Massachusetts statutes and decisions reveals nothing in any degree casting doubt upon the accuracy of the five propositions (*a*) to (*e*), *supra*, pp. 35 to 37, as a statement of the existing Massachusetts probate law with respect to the continuance of trust companies and national banks as court-appointed fiduciaries after consolidations of the types above mentioned. These propositions, taken in connection with the doctrine that a petition for administration *de bonis non* with the will annexed (or other appropriate petition in the case of other probate trusts) must be presented when an executor becomes incompetent or ceases to exist, show absolutely no discrimination against national banks in the conduct of their fiduciary business in Massachusetts. It must be conceded that the Massachusetts statutes and rules with respect to probate procedure treat national banks as well as state trust companies in every particular. To compel the Probate Court in the case at bar to recognize as its fiduciary the appellant, The Worcester County National Bank of Worcester, under the original appointment of the Fitchburg Bank and Trust Company—

(*a*) Would be in contravention of the rules of Massachusetts probate procedure, and, therefore, inconsistent with the whole tenor of Federal legislation giving national banks power to compete in fields allied to the primary functions of banking *on a parity* with state banks and trust companies, and subject to the same regulatory provisions of state rules of equity and probate law;

(*b*) Would be giving to national banks consolidating with state banks powers of succession as executor, trustee, or other fiduciary, which would not be given to another state trust company absorbing the same trust company under G.L., c. 172, §44, as amended by St. 1922, c. 292 (*supra*, p. 32); a discrimination in favor of national banks which has not elsewhere been given to national banks by Federal legislation with respect to the incidental powers

to compete. We submit that the burden is on the appellant to show a discrimination against it in order to obtain relief from this Court.

The consequence of dealing with assets of estates in process of administration and, therefore, *in custodia legis*, is laid down by the Supreme Judicial Court with respect to a consolidated bank which has not petitioned for appointment as successor to a fiduciary position held by a bank or trust company which it has absorbed. It has been decided that thus intermeddling with the funds of the estate by the consolidated banks renders it liable as an executor *de son tort*.

> *Atlantic National Bank, petitioner*, 261 Mass. 217, 221.

An unauthorized individual dealing with the estate of a deceased person in the same way would be subjected to the same liability.

G.L., c. 195, §§ 14 and 15, which read as follows:

> "Section 14. Whoever injuriously intermeddles with any personal property of a deceased person, without being thereto authorized by law, shall be liable as an executor in his own wrong to the persons aggrieved.
>
> "Section 15. An executor in his own wrong shall be liable to the rightful executor or administrator for the full value of the personal property of the deceased taken by him and for all damages caused to the estate by his acts; and he shall not be allowed to retain or deduct any part of such estate, except for funeral expenses or debts of the deceased or other charges actually paid by him and which the rightful executor or administrator might have been compelled to pay."

See *Clabburn* v. *Phillips*, 245 Mass. 47, 49, *et seq.*

The effect of sustaining the decision below in this case would be to require the appellant to account solely as ex-

ecutor *de son tort* in the estate of Julia A. Legnard from and after the date of the consolidation. That effect could have been avoided by the appellant by the simple expedient of bringing a petition for administration *de bonis non* with the will annexed (see form, Appendix E, *infra*, p. 81). There is nothing upon this record to indicate that the appellant would not have been appointed such administrator upon a suitable petition. Without showing that it has presented such a petition and that the petition has been denied solely or partly because it is a national bank, the appellant does not establish any discrimination against it. The opportunity given to beneficiaries and to other persons interested in the estate to show upon the hearing of such a petition that the petitioner is not a suitable person, by reason of adverse interest or otherwise, is one of the incidents of Probate Court supervision of the administration of estates in Massachusetts to which, we submit, the acts of Congress giving national banks power to act as fiduciaries have subjected those banks in the conduct of their business as fiduciaries.

Two further matters must be mentioned with reference to the law of probate procedure in Massachusetts because of contentions made in the appellant's brief:

(*a*) The case of *Iowa Light &c. Co.* v. *First National Bank of Boston*, 250 Mass. 353 (see appellant's brief, p. 27), is cited by the appellant as a decision by the Massachusetts court that a national bank succeeds as of right by consolidation to all the rights, title, and powers of trust companies which it has absorbed. In that case the precise question before the court was whether the defendant national bank had succeeded an absorbed trust company as trustee under a trust mortgage. The court held that it had. The case is explained and distinguished from cases involving *fiduciaries appointed by a court* in *Atlantic National Bank, petitioner*, 261 Mass. 217, 220-221, in the following language:

"The petitioner relies upon a sentence in the opinion in *Iowa Light, Heat & Power Co.* v. *First National Bank of Boston*, 250 Mass. 353, 354, where, referring to the effect of a similar subsequent conversion of a trust company into a national bank and consolidation with another national bank upon a corporate indenture to secure an issue of bonds given to the trust company, it was held that the national bank had succeeded to all the rights, title and powers of the trust company and was trustee for the bondholders. The point here raised was not there argued and no reference was made to it. That decision was right and is not at variance with the conclusion reached in *Commonwealth-Atlantic National Bank of Boston, petitioner, supra*, here affirmed. The indenture under review in 250 Mass. 353, was a contract between competent parties. The rights and obligations arising therefrom were chiefly contractual in nature although partaking also of such subsidiary fiduciary nature as may spring from such a contract. Fiduciary relations resting on statutory provisions and founded on a decree of a court with the characteristics pointed out in 249 Mass. 440, stand on a different footing with respect to succession by a different corporation for the reasons stated in this latter decision."

See also Opinion below, 1928 Mass. Adv. Sh. 1213, 1220; R. 21-24.

Atlantic National Bank v. *Harris*, 118 Mass. 147 (see appellant's brief, p. 32), may be distinguished on the same basis as the *Iowa Light Co.* case, *supra*.

The distinction between the transfer of contract obligations and the transfer of fiduciary obligations based on court appointment (which are by state law highly personal and confidential and which the State does not permit its own state trust companies to assign or to transfer to successors) is clearly established by the Massachusetts statutes and de-

cisions. It is upon this basis that the Supreme Judicial Court of Massachusetts in the opinion below (1928 Mass. Adv. Sh. 1213, 1220; R. 15, 22) distinguishes *Metropolitan Bank* v. *Claggett*, 141 U.S. 520, and *Michigan Ins. Bank* v. *Eldred*, 143 U.S. 293. Obviously, readily assignable obligations and rights based on contract alone were considered in those cases, and, as the Massachusetts court indicates, language in those decisions seeming to have a broader application should be limited to the issues there expressly raised and decided.

(*b*) The other matter mentioned in the appellant's brief which here requires comment is the discussion of St. 1911, c. 128 (appellant's brief, pp. 31, 37). That statute (reprinted, Appendix F, *infra*, p. 84) provided for the consolidation by special act of four Massachusetts trust companies under the name of one of them, The Old Colony Trust Company. It was expressly provided that the merger thus authorized should not "work a dissolution of any of said trust companies or a termination of their several corporate existences." A further provision was made for the continuance of the obligations, duties, trusts, and liabilities of the merged banks by the consolidated bank under the name of Old Colony Trust Company. The pertinent section (§3) of the statute has never been construed by the Supreme Judicial Court of Massachusetts, so far as we have been able to discover. The statute, we contend, is not in any sense helpful to the appellant in the case at bar; even if the statute (St. 1911, c. 128, §3, *infra*, p. 84) be construed as entitling the Old Colony Trust Company to exercise the functions of fiduciary in cases where the other corporate parties to the merger had originally been appointed by the Court:

(*i*) The statute was a specific determination by the Massachusetts legislature that a specific combined trust company was empowered to act as executor, trustee, etc., subject to the supervision of the Probate Court, where its

component parts (other trust companies whose corporate existence was expressly continued in the merged trust company) had been appointed. It was not a *general* determination that *all* merged trust companies were so empowered to act. It was at the most a finding of fact by the legislature that a *specific* trust company would embody the corporate existence of all its component parts, and would constitute a "suitable person" where any of its component parts had been so regarded by the Court. We do not doubt that the Probate Court would have removed the Old Colony Trust Company as fiduciary in any case where the consolidation caused the combined bank to be representing other interests inconsistent with the trusts in that specific case (compare, *supra*, p. 37). The consolidation in the case at bar took place under a *general* statute.

(*ii*) Under the propositions of law with respect to continuance of consolidated banks as trustees which we have already stated (*supra*, pp. 35 to 37), the Massachusetts court could consistently have permitted the Old Colony Trust Company to account in an estate where the Massachusetts Trust Company (one of the parties to the merger) had originally been appointed by the Court as executor, because of the express act of legislature continuing the corporate existence of the Massachusetts Trust Company in the Old Colony Trust Company. The original executor, the original officer of the court, still existed, though under a different name, and under the doctrine of *Worcester County National Bank, petitioner* (No. 1), 1928 Mass. Adv. Sh. 1195; 161 N.E. 797, the change in name did not result in a change in corporate identity. The situation in the case at bar is clearly distinguishable. By the construction of G.L., c. 172, §44 (as amended by St. 1922, c. 292, *supra*, p. 32), adopted by the Massachusetts court (in the opinion below, 1928 Mass. Adv. Sh. 1213, 1218; R. 15, 20), upon any merger or consolidation, a state trust company which is merged in or is the subordinate party to a consolidation

with another trust company or bank ceases to have any corporate identity and is thereafter incapable of doing business. After the consolidation, therefore, the executor appointed by the Probate Court did not exist.

(iii) At the time of the passage of St. 1911, c. 128, there was no general statute authorizing the consolidation of state trust companies. Special act of legislature alone could achieve the result, and we do not dispute that it was as competent for the legislature to declare that two of its own corporate creatures should combine and carry on thereafter a joint corporate existence as for it to provide for an increase in the amount of authorized capital stock of one of the corporations. A general statute has since been passed covering consolidations of state trust companies with other banks (originally passed as St. 1914, c. 504, §2) and by the terms of that general statute (as it now stands in G.L., c. 172, §44, as amended by St. 1922, c. 292) the consolidation effects a termination of the corporate existence of the absorbed trust companies. The present general situation, rather than the sporadic instance long in the past of special legislation, must be taken as representing what the Massachusetts legislature permits to its own corporations doing a fiduciary business by way of continued corporate existence for the purpose of such fiduciary business after a consolidation.

Cases in some jurisdictions other than Massachusetts do not represent the law in Massachusetts as to the right of a consolidated corporation to succeed without new appointment by the Court to the court appointments of its component parts. Such cases hold that under the law of those States a consolidated corporation is sufficiently the successor of the component corporations, parties to the consolidation, to be recognized as successor to all interests in the fiduciary duties and privileges of those component corporations.

New York:

Bergdorf's Will, 206 N.Y. 309.
O'Rourke v. *Standard Wood Turning Co.*, 204 App. Div. 658.
Cf. Re Doane's Estate, 208 N.Y. S. 320.
Wright v. *Wright*, 225 N.Y. 329, 338.

Illinois:

Chicago Title & Trust Co. v. *Zinser*, 264 Ill. 31:

(In this case a successor trust company, by consolidation, was treated as the executor named in the will, although the absorbed trust company had ceased to exist according to state law. The case takes a different view of the law than the Massachusetts decision in *Commonwealth-Atlantic National Bank, petitioner*, 249 Mass. 440; certiorari denied 266 U.S. 617.)

Pennsylvania:

Turner's Estate, 277 Pa. 110—

is not by any means a square holding for the proposition for which the appellant cites it in its brief at p. 31, viz., that a consolidated bank is entitled to succeed, without new petition to the court, to the trust appointments of banks which it absorbed. In that case it appears at page 113 that the consolidated national bank presented to the Orphan's Court a petition requesting that funds of an estate, administered by a state trust company which it had absorbed, be paid to it and that it be approved as fiduciary. We submit that the decision merely goes to a holding that the Orphan's Court could not refuse to appoint the consolidated bank as fiduciary purely because it was a national bank. Nothing in the decision can be construed as a holding that the consolidated bank would be entitled to account as fiduciary without new appointment by the Orphan's Court. That point was not raised, was not discussed, and

was not decided. The point decided—that national banks cannot be refused appointments by state courts, if otherwise suitable persons, purely because they are national banks—is law in Massachusetts (see opinion below, 1928 Mass. Adv. Sh. 1213, 1226, R. 15, 27-28; *Commonwealth-Atlantic National Bank, petitioner*, 249 Mass. 440, 442; *Atlantic National Bank, petitioner*, 261 Mass. 217, 220), as indeed it must be following *First National Bank of Bay City* v. *Fellows*, 244 U.S. 416; *Burnes National Bank* v. *Duncan*, 265 U.S. 17. See similar cases in other States: *Hamilton* v. *State*, 94 Conn. 648; *People, ex rel. First National Bank of Joliet*, v. *Russell, Auditor*, 283 Ill. 520; *Re Mollineaux*, 179 N.Y. S. 90; *Stanchfield's* Estate, 171 Wis. 553; *Carpenter* v. *Aquidneck National Bank*, 46 R.I. 152. We think the cases last cited are consistent with the Massachusetts law upon the precise point that there must be no discrimination against national banks.

California:

> *Mercantile Trust Company* v. *San Joaquin &c. Corp'n*, 265 Pac. 583 (Calif. Dist. Ct. of App., 3d Dist., Feb. 29, 1928)—

is merely on its facts (see appellant's brief, p. 28) a case like *Iowa Light, Heat & Power Co.* v. *First National Bank*, 250 Mass. 353, 354. That case and *Atlantic National Bank* v. *Harris*, 118 Mass. 147, as already stated (*supra*, p. 40), are distinguishable on the basis of the differentiation existing under Massachusetts law between fiduciary relations growing out of contract and those which depend fundamentally upon court appointment. So far as the California decision deals with the continued corporate existence of trust companies (see appellant's brief, p. 28), it is inconsistent with the Massachusetts law with respect to the invalidation of the charters of trust companies upon their merger in another corporation (see *supra*, pp. 32 to 34).

5. *The Disputed Language, Properly Construed, of the Act of February 25, 1927, §1, Confers upon a Consolidated National Bank the Power to Act as Fiduciary in the Estates in which a State Bank or Trust Company, which it has Absorbed, has thus Acted after Compliance with the Non-Discriminatory Provisions of State Law Applicable to All Successors of Fiduciaries and without a Permit from the Federal Reserve Board to Act as Fiduciary Generally.*

We have endeavored thus far in this brief to show that section 1 of the Act of February 25, 1927, by its own language (*supra*, pp. 19 to 20), as interpreted in the light of its own legislative history (*supra*, pp. 14 to 18) and in the light of preëxisting Federal legislation permitting and authorizing national banks to do business as fiduciaries, gave to national banks power to act as fiduciaries as successors to state trust companies only in compliance with the non-discriminatory provisions of state probate law governing the succession of court-appointed fiduciaries. We contend that we have shown (*supra*, pp. 26 to 40) that the provisions of Massachusetts law applied to the appellant in the case at bar would be applied to any person (whether an individual, a state trust company, or a national bank) intermeddling with the assets of the estate of a deceased person without authority from the court after the executor originally appointed had died or had ceased to exist as a person capable of doing business as a fiduciary. It is necessary for us to show at this point precisely what we believe is the significance of the disputed language (quoted *supra*, p. 16) in section 1 of the Act of February 25, 1927, for that language must be taken to have some effect independently and apart from a restatement of pre-existing statutory enactments. In the language of Mr. Justice *Sutherland*, in *Petition of Public National Bank of New York*, U.S. Supr. Ct., Oct. term, 1928, No. 16, dec. November 19, 1928, 49 Sup. Ct. Rep. 43, 44:

> "No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that 'significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, § 2, it was said that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' "

We submit that the disputed words in section 1 of the Act of February 25, 1927 ("*including the right of succession as trustee, executor, or in any other fiduciary capacity* in the same manner and to the same extent as was held and enjoyed by such State or District Bank so consolidated with such national banking association"—see *supra*, p. 16), have an independent meaning and a novel force and effect without going to the extent contended for by the appellant, whose construction would be at once in total disregard of the spirit of the whole statutory history of the grant of power to national banks to act as fiduciaries (including the Act of February 25, 1927) and in contravention of the uniform and non-discriminatory requirements of Massachusetts probate practice. The construction which we believe the court should attach to the disputed language is as follows:

(*a*) Consolidated national banks are by section 1 granted the *power* to act as fiduciary in estates in which any bank (whether state bank, trust company, or national bank) party to the consolidation had already qualified as fiduciary or by state law was entitled so to qualify; whether or not the particular consolidated national bank had received a permit to do a fiduciary business from the Federal Reserve Board (under section 11 (*k*) of the Federal Reserve Act, as amended by section 2 of the Act of September 26, 1918, quoted, Appendix A, *infra*, pp. 71 to 73; see also *supra*, pp. 20 to 26). By said section 11 (*k*), as amended,

national banks desiring to do a general business as fiduciaries were required to get a permit from the Federal Reserve Board before undertaking such business. It is our contention that the disputed language (see *supra*, pp. 16, 48) in section 1 of the Act of February 25, 1927, in substance authorizes national banks with which a state bank or trust company has been consolidated to act as fiduciary without the Federal Reserve Board permit required by section 11 (*k*) in estates in which the state trust company had acted in similar capacity—*i.e.* in those particular estates; it would not be *ultra vires* the consolidated national bank or otherwise unlawful for it to act as fiduciary.

This is in part the construction taken by the Federal Reserve Board in construing the section in its regulations.

> Regulation F, Series of 1928; published Fourteenth Annual Report of the Federal Reserve Board, 1927, pp. 286 *et seq.*, and quoted in part, Appendix G, *infra*, p. 86; see appellant's brief, p. 44.

(*b*) The right of succession to the absorbed state bank or trust company as fiduciary is given to the consolidated national bank to the extent that the state bank or trust company had a right, vested and assignable under the laws of the State which created the right. Subject to the procedural provisions of state statute law, as are all the other provisions of section 1 of the Act of February 25, 1927 (see discussion, *supra*, pp. 19 to 20), the consolidated bank, by virtue of the disputed language, may perfect its power to act as fiduciary in the particular estates in question by suitable application to the Probate Court (if such application be required by state law) in cases of court-appointed fiduciary positions; or by the execution of appropriate documents in the case of fiduciary rights arising purely *ex contractu* [*e.g. Iowa L., H. & P. Co.* v. *First National Bank*, 250 Mass. 353, 354; *Mercantile Trust Company* v. *San Joa-*

quin &c. Corp'n, 265 Pac. 583 (Calif. Dist. Ct. of App., 3d Dist., Feb. 29, 1928), see *supra*, p. 46]. The fact that in some States, as we have indicated above (*supra*, p. 44), the law of probate procedure is different from the Massachusetts law and permits consolidated corporations to succeed automatically to the court appointments of their component parts as fiduciaries lends weight to our contention. In such States the disputed words of section 1 would have the force for which the appellant contends. Since, in such jurisdictions, state trust companies succeed automatically to the court appointments of other trust companies which they have absorbed, national banks similarly absorbing other corporations will do so. In those States the right to have a corporate successor succeed to the appointment as fiduciary is implied in, and is an integral part of, the original appointment by the Court of a corporation as a fiduciary. It makes the appointment in effect assignable upon merger or consolidation.

See *e.g. Bergdoff's Will*, 206 N.Y. 309.
O'Rourke v. *Standard Wood Turning Co.*, 204 App. Div. 658.
Chicago Title & Trust Company v. *Zinser*, 264 Ill. 31 (see *supra*, pp. 44 to 46).

Under the legislative policy behind section 1 and all other legislation with respect to the so-called "incidental powers" of national banks, they have the power to compete on equal terms with state banks in the exercise of the incidental powers; and section 1, in accordance with that policy, gives the right of automatic succession as fiduciaries generally to consolidated national banks in States where any corporate successors are permitted automatically to succeed corporate predecessors as fiduciaries. In Massachusetts, as we trust we have indicated sufficiently above (*supra*, pp. 34 to 38), automatic succession of a con-

solidated corporation to the court fiduciary appointments of corporations which it has absorbed is not permitted by the probate law of the State. Whatever may be the logical merit of this policy so far as it is based on decision, it is the state law as declared by the highest court of the Commonwealth, and this Honorable Court will accept it as such. (The contentions of the appellant in its brief, pp. 36 to 40, we submit, in so far as they purport to state the Massachusetts law, are inaccurate; and, in so far as they claim it to be logically unsound, are irrelevant.) There is obviously no legislative intention that there shall be geographical uniformity in the application of section 1 of the Act of February 25, 1927. The force of the disputed language will undoubtedly vary as among the several States. For example, a New Hampshire trust company will have no appointments as executor or administrator upon its books (see *Woodbury's Appeal*, 78 N.H. 50, construing New Hampshire Laws of 1915, c. 109, §34) as to which any question of succession may arise because of state statutory limitations upon the right of any corporation to act in those capacities. On the other hand, in some States, like Illinois (under the *Zinser* case, 264 Ill. 31, see *supra*, p. 45), the consolidated national bank would probably succeed automatically to many different types of fiduciary business. The same may be said as to the lack of uniformity of operation of other portions of the section. In some States all consolidations of state banks may be forbidden unless specially authorized by special act of legislature; in others, no consolidation may be "in contravention of state law." It cannot be said, we submit, in view of the difference in effect and operation of the section as among the several States in other respects, that the disputed language must have been intended to give all national banks wherever situated the same powers, privileges, and rights regardless of the variations in state law. We submit, therefore, that the words "the right of succession" imply the right of suc-

cession as such right exists by state law in each State with respect to corporations acting as fiduciary. In Illinois that would probably have the automatic effect which we have indicated above. In Massachusetts automatic succession as fiduciary could extend only to trusts arising *ex contractu* (see *supra*, pp. 40 to 42). As to Massachusetts court appointments as fiduciary, the state law and, we submit, section 1 give to a consolidated corporation at most the right to apply for appointment as successor, with possibly the additional standing (by force of section 1) of being *prima facie* the most appropriate successor. How far the consolidated bank is entitled to succeed upon proper petition, if a "suitable person," is not presented on this record and need not be decided, for the Worcester County National Bank has never petitioned the Probate Court for Worcester County for appointment as administrator *de bonis non cum testamento annexo* of the estate of Julia A. Legnard (see Appendix E, *infra*, p. 81, for appropriate form. See also *supra*, pp. 28 to 30). It is altogether likely that, had such a petition been presented to the Probate Court, it would have been granted. At all events, the record gives no basis for considering the effect of a denial of such a petition.

The construction of the disputed language (*supra*, p. 16) for which we contend, therefore, may be summarized, in the situation in the case at bar, as empowering and entitling the Worcester County National Bank—

(*a*) To do business as a fiduciary in estates previously handled by the Fitchburg Bank and Trust Company without a permit from the Federal Reserve Board.

(*b*) To apply to the Court for appointment as successor fiduciary in the estates previously handled under court appointment by the Fitchburg Bank and Trust Company in accordance with the provisions of Massachusetts statutory and decisional probate law.

(*c*) To succeed automatically to fiduciary positions, previously held by the Fitchburg Bank and Trust Company, arising out of contract rather than from court appointment.

Such a construction, we submit, gives to the disputed language a reasonable force and effect, consistent with the legislative intent manifested by national bank legislation in general and in particular by section 1 of the Act of February 25, 1927. The construction does no violence to fundamental and non-discriminatory provisions of state law, and in many States gives to the language the force for which the appellant contends, preserving at the same time, in States having provisions of law similar to those in force in Massachusetts, the close Probate Court supervision of the administration of estates which a sound policy of protecting the beneficiary (rather than enrichment of the fiduciary) requires. There is no doubt as to the constitutionality of section 1 or of any portion thereof under this interpretation, and, if the construction outlined be accepted by this Honorable Court, the decree below should be affirmed without discussion of the constitutional question upon which the Supreme Judicial Court of Massachusetts based its decision.

II.

IF SECTION 1 OF THE ACT OF FEBRUARY 25, 1927, BE CONSTRUED TO REQUIRE A STATE PROBATE COURT TO RECOGNIZE AS EXECUTOR A CONSOLIDATED NATIONAL BANK IN THE PLACE OF THE COURT'S ORIGINAL APPOINTEE, A TRUST COMPANY WHICH HAS BEEN ABSORBED BY THE CONSOLIDATED BANK, WITHOUT NEW APPOINTMENT BY THE COURT OF THE CONSOLIDATED BANK AS FIDUCIARY, SECTION 1 IS PRO TANTO IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES.

Our argument above (*supra*, pp. 10 to 53) has been that section 1 of the Act of February 25, 1927, should be con-

strued in a manner which would raise no doubt as to its constitutional validity. The construction for which we contend has been set forth fully (*supra*, pp. 47 to 53). If, however, the construction there suggested is not taken by this Honorable Court, a further question arises as to the constitutional validity of a portion of the section. The construction of the disputed words of section 1 taken by the Supreme Judicial Court of Massachusetts (R. 24, and assumed by the appellant in its brief, pp. 11, 21, 33, 42, *et seq.*) is stated by Mr. Chief Justice *Rugg* in the following language in the opinion below, 1928 Mass. Adv. Sh. 1213, 1223; R. 15, 25):

> "The words just quoted from said § 3 seem to us to carry the unmistakable import that in case of consolidation the national banking association shall possess and enjoy all appointments as executor, administrator, or other fiduciary held by the absorbed State bank by virtue of any decree of any court without further action by the appointing court, as fully and completely as if it were the State bank, or as if it had originally been appointed to these fiduciary positions by the court."

The Supreme Judicial Court took this view under circumstances already outlined above (*supra*, p. 11), probably resting its decision in large part upon the construction taken by the Comptroller of the Currency (see Fourteenth Annual Report of the Federal Reserve Board, 1927, pp. 267-271; appellant's brief, p. 42 *et seq.*). Although great weight should be given to a long-existing departmental interpretation of an ambiguous statute, particularly to a construction which is contemporaneous with the passage of the act, a departmental construction cannot be given the force of law when the construction is challenged in the courts almost as soon as it is known.

See *Iselin* v. *United States*, 270 U.S. 245, 251.

We submit that this Honorable Court should not follow the Massachusetts court in its reliance upon the opinion of the Comptroller of the Currency. If, however, the construction of the disputed words of section 1 taken below is followed by this Court, we contend that those words as construed are invalid, as in conflict with the Constitution of the United States, because they constitute an attempt by Congress to regulate matters expressly reserved to the States.

A. *The Control of the Administration of the Estates of Deceased Persons is Reserved to the States.*

There is nothing in article I, section 8, of the Constitution of the United States, containing the express grant of power to the Congress, which in terms or by construction gives to the Congress control over the administration of the estates of deceased persons. The States, by article I, section 10, are not forbidden to exercise such control, and it follows that by article X of the Amendments to the Constitution, this control being a power not delegated to the United States, is reserved to the States. The administration of estates was a function carried on by the local authorities of the several States long prior to the adoption of the Federal Constitution. It is a matter in its nature almost of necessity of local concern. The framers of the Constitution and the members of the conventions which ratified it must be taken to have known of the exercise of control over decedents' estates by the several States. In Massachusetts, the administration of estates was provided for from the earliest days of the Massachusetts Bay Colony. See the following documents in "The Charters and General Laws of Massachusetts Bay" (Boston, 1814 ed.): Colony Charter, 1628, p. 14; Province Charter, 1691, p. 32; Acts respecting Wills and the Distribution of Intestate Estates, p. 203. See short summary of Colonial Probate Practice,

PERLEY, MASSACHUSETTS PROBATE PRACTICE (2 ed. 1907), pp. 1-3. The Great and General Court, shortly after the adoption of the Constitution of the Commonwealth of June 15, 1780, enacted comprehensive provisions for courts of probate. St. 1783, c. 46, approved March 12, 1784. These provisions have remained substantially unchanged to the present time. In construing the reservation of powers contained in article X of the Amendments, the existence of the Massachusetts legislation just referred to is important.

See rule of construction laid down in *Rhode Island* v. *Massachusetts*, 12 Peters, 657, 723; *cf. Myers* v. *United States*, 272 U.S. 52, 175.

This Court has recognized that the right of succession at death and the supervision of the exercise of the right is based on the authority and sovereignty of the several States. *Plummer* v. *Coler*, 178 U.S. 115, 137; *Tilt* v. *Kelsey*, 207 U.S. 43, 57; *cf. Stebbins* v. *Riley*, 268 U.S. 137, 141. It has further recognized that the assets of an estate in process of administration are in the custody of a court exercising probate powers. *Yonley* v. *Lavender*, 21 Wall. 276, 280; *Byers* v. *McAuley*, 149 U.S. 608, 615; *cf. Lion Bonding Co.* v. *Karatz*, 262 U.S. 77, 88-89.

To some extent, in its incidental phases, at least, the transmission of property at death by virtue of state law may be materially affected by action of Congress within the scope of some of its enumerated powers. An instance of the exercise of this power is the taxation of the transmission of estates by way of excise, upheld in numerous cases.

Knowlton v. *Moore*, 178 U.S. 41, 56-61.
New York Trust Company v. *Eisner*, 256 U.S. 345, 348, *et seq.*
Cf. Florida v. *Mellon*, 273 U.S. 12, 16, *et seq.*

With respect to the incidental business of national banks, confessedly Congress may forward the national in-

terest by permitting banks to do such business so far as the express powers contained in article I, section 8, of the Constitution warrant. *Burnes National Bank* v. *Duncan*, 265 U.S. 17; *First National Bank of Bay City* v. *Fellows*, 244 U.S. 416. The extent and scope of the enumerated powers on which the National Banking system and the Federal Reserve system rest must here be considered, as well as the effect of state law and regulation upon the exercise of the incidental powers.

B. *Congress may Provide for the Protection of National Banks from Discriminatory State Legislation with Respect to their Incidental Powers. It can Maintain National Banks in Their Exercise of the Incidental Powers upon a Parity with Competing Corporate Agencies of the States Carrying on Similar Functions. The Power of Congress with Respect to the Incidental Powers of National Banks is Limited to the Protection of the Exercise of Those Powers from Discriminatory State Legislation or Action and to the Preservation of Equal Opportunity to Compete with State Banks. Non-Discriminatory State Laws Regulating the Administration of Estates are beyond Congressional Interference under the Constitution.*

The general power of the Congress with respect to banking and finance is so well established as to require no discussion. With the general statements contained in the appellant's brief (pp. 9 to 15) as to the necessity for a powerful national banking system, on the whole, we do not disagree. Nor is the plenary power of Congress with respect to the primary banking functions in any way disputed here. The general constitutional doctrine has been amply stated by Mr. Chief Justice *White* in *First National Bank of Bay City* v. *Fellows, ex rel. Union Trust Co.*, 244 U.S. 416, 418, *et seq.*, where the authorities, beginning with *Mc-*

Culloch v. *Maryland*, 4 Wheat. 316, were summarized. With the doctrine there stated, the Supreme Judicial Court of Massachusetts, in the opinion below (1928 Mass. Adv. Sh. 1213, 1226; R. 15, 27-28), states its cordial agreement. Where, in the exercise of powers not primarily banking functions (powers within the gift of the Congress only because of a situation of state law making the grant of power as a matter of fact an appropriate adjunct of the primary banking function), national banks come to carry on business as officers of state courts by appointment of those courts, a situation arises which calls for a rather delicate adjustment of the balance of authority between two sovereignties, the Federal Government and the States, each of which has exclusive jurisdiction over some phases of the situation, while at the same time, with respect to other phases, each is unable to exclude the exercise of jurisdiction by the other sovereignty. The interplay of authority of the two sovereignties, at the same time partly conflicting and partly coördinate, gives rise to a justiciable constitutional question which this Honorable Court must decide in the last analysis, giving due weight to the boundaries of Federal and State power, so far as those boundaries are by the Constitution capable of absolute measurement; and respecting the judgment of Congress upon questions of fact and policy (provided that judgment bears any rational relation to the situation of fact in the external world of national and business affairs) in so far as the constitutional powers which Congress purports to exercise depend upon a legal standard, laid down in the Constitution, under which standard the precise form and extent of the exercise of the powers may vary as the facts of the life of the nation change. The constitutionality of the exercise of either State or Federal power with respect to its effect upon the powers of the other member "of our constitutional system of dual sovereign governments" (see Mr. Justice *Stone*, speaking for the Court in *Metcalf &*

Eddy v. *Mitchell*, 269 U.S. 514, 521) depends in the last analysis upon a weighing by this Court of the burden imposed by the exercise of the power asserted upon the exercise of another power admittedly within the province of the other sovereignty. Such is the method of approach of this Court in cases involving taxation by one sovereignty either directly or indirectly of the instrumentalities of the other. The validity of the tax depends upon the degree and directness of the impediment of the exercise of the power affected by the tax. To quote further from the opinion in *Metcalf & Eddy* v. *Mitchell*, 269 U.S. 514, 523:

> "Experience has shown that there is no formula by which that line may be plotted with precision in advance. But recourse may be had to the reason upon which the rule rests, and which must be the guiding principle to control its operation. Its origin was due to the essential requirement of our constitutional system that the federal government must exercise its authority within the territorial limits of the states; and it rests on the conviction that each government, in order that it may administer its affairs within its own sphere, must be left free from undue interference by the other."

A similar attitude of weighing the extent of Congressional interference with the exercise of state powers appears in *Knoulton* v. *Moore*, 178 U.S. 41, 59-60.

We submit, therefore, that this Court will endeavor to reach a conclusion which carries out the Congressional intention that national banks shall be able to consolidate freely with state banks without resulting loss of business and at the same time a result which does not interfere with the proper operation of the non-discriminatory provisions of state law governing the administration of estates. The incidental powers of national banks have been given to them by Congress to protect them from state bank-

ing competition, which has arisen because the States have permitted other businesses to be joined with the banking function. The banking function is clearly within the scope of Congressional power and Congress may protect its integrity from more favored competing state agencies by permitting national banks to do all forms of business which those competing agencies do, even though, in the absence of the competition furnished by those agencies, there would be no constitutional justification for empowering national banks to do such business. More particularly, the power of national banks to act as fiduciaries rests upon the competition with the primary banking functions furnished by state banks which do a fiduciary business as well. In the absence of such competition the constitutional basis for the grant of power would not exist. This, we submit, was recognized in the case of *First National Bank* v. *Fellows, ex rel. Union Trust Co.*, 244 U.S. 416, 425-426. The protection of the power to compete was also made the basis of upholding the constitutionality of section 11 (*k*) of the Federal Reserve Act as amended by the Act of September 26, 1918 (see Appendix A, *infra*, p. 71; see *supra*, pp. 20 to 26), in *Burnes National Bank* v. *Duncan*, 265 U.S. 17, 23-24. It is of the essence of the idea of competition that two or more persons engaged in the same occupation be carrying on that occupation upon even terms, subject to the same limitations and restraints, given the same advantages and opportunities. The right and power to compete, granted to national banks by Congress under the Constitution, extends by its very nature only to freedom from discriminatory restraint and regulation by the State in businesses allied to banking, in which the right of national banks to engage at all rests constitutionally upon the fact that state banks engage in such business.

We do not understand that the appellant seriously disputes the fact that the regulation of the succession of estates is a matter constitutionally under the primary con-

trol of the several States; although in its brief (p. 33 *et seq.*) it is argued that Congress is competent as a legislature to substitute its determination of the fitness as executors of national banks generally for the judicial determination of the Probate Courts of the States in specific instances. We submit that this contention is carrying altogether too far the doctrine that incidental powers may be attached to the banking function. There must be a point where the exercise of Congressional power becomes too remotely connected to any of the enumerated or implied powers in the Constitution, art. I, sec. 8, and bears too heavily upon the admitted right of the States to regulate matters within their reserved powers. *Cf. Child Labor Tax Case*, 259 U.S. 20, 36, *et seq.* In that case, the Chief Justice, speaking for this Honorable Court, said with respect to the purported exercise of the taxing power by Congress there considered (at p. 38):

> "Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the States have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States."

In the case at bar (if the construction of section 1 of the Act of February 25, 1927, taken by the Supreme Judicial Court of Massachusetts, be taken by this Court) it might equally well be said that the contention of the appellant, if sustained and pushed to its logical consequences, would enable Congress to control any one of the subjects of pub-

lic interest, jurisdiction of which the States have never parted with, by permitting national banks to do all the business connected with the subject and by making regulatory provisions for the doing of such business by national banks. The sovereignty of the States is in as much danger from undue extension of Congressional *favors* to national banks with respect to matters not primarily banking functions as it was in 1922 at the time of the *Child Labor Tax Case* from an unwarranted purported use of the taxing power.

We have already said enough (*supra*, pp. 35 to 38) to show that Massachusetts does not in any way by its probate law discriminate against national banks or consolidated national banks in favor of any other person. Under Massachusetts law, where by consolidation a separate corporate person appears in place of the corporate person originally appointed to some trust by the courts of the State, the position of trust becomes vacant. The corporate successor, by consolidation or otherwise, must, if it desires to carry out the trust, seek new appointment, giving the courts of the State an opportunity to pass upon the fitness of the new corporation for the particular trust. The situation is no different with respect to the succession of individuals. The rule laid down by Massachusetts law is for the benefit of the beneficiaries of trusts or estates, and indirectly for the benefit of the public generally.

The Massachusetts legislature, before the adoption of the Federal Constitution (see *supra*, p. 55), saw fit to make the supervision of the conduct of estates and trusts a judicial matter of the utmost importance. The supervision given by the courts of Massachusetts under the powers delegated to them has unquestionably resulted in a high standard of fiduciary conduct within the Commonwealth, the popularity of which is reflected in part in the growth of the so-called "Massachusetts Trust" whereby the common-law trust device has been made available for

business purposes. We think it obvious that this growth would never have taken place except for the experience of residents of the Commonwealth with individual trustees of great integrity, kept to a high standard of business management, honesty, and disinterested service by the supervision of the courts. In the administration of estates of deceased persons the public interest in court supervision is infinitely greater than in the case of business trusts. Without stooping to maudlin sentimentality in the slightest, it is perfectly fair to say that the Probate Court is the safeguard provided by the Great and General Court for the widows, orphans, and other helpless dependents of decedents. The rules of supervision of estates laid down by the Massachusetts law (both statutory and decisional) are for the prevention of fraud, dishonesty, and incompetency in connection with the primary support of a helpless group in the community, the members of which, if not protected to the utmost, may become public charges. The attitude that fiduciary business is primarily for the benefit of the fiduciary (particularly if that fiduciary be a bank or trust company), rather than for the benefit of the *cestuis que trust* or heirs and legatees of an estate, is directly opposed to the fundamental principles of Massachusetts jurisprudence. Such an attitude, we feel, unconsciously colors even the careful discussion of the situation in the case at bar by *Thomas B. Paton*, Esq., *Succession to Trust Powers on National Bank Consolidation*, American Bankers Association Journal, August, 1928, p. 97.

The reserved powers of the Commonwealth (under article X of the Amendments of the Constitution of the United States) could not be more properly exercised than in connection with the administration of estates, and in no respect could unconstitutional Congressional interference with those powers result in a greater denial of state sovereignty. Yet we do not contend for an instant that these powers can be used by Massachusetts "to reach an

unconstitutional result" (to use the language of Mr. Justice *Holmes* in *Burnes National Bank* v. *Duncan*, 265 U.S. 17, 24). Massachusetts admittedly does not attempt to use its power to control the administration of estates to destroy nor indeed injuriously to affect the power of national banks to compete. The regulation of fiduciaries imposed by state law is established for another purpose; it applies evenly to state trust companies and to national banks when in the same situation; it has no discriminatory effect upon any person or corporation; its sole object and effect is the maintenance of a sound system of the administration of estates subject to judicial supervision at all times, and especially where a person appointed to a trust ceases himself to serve, and a new person must succeed to the trust. Such a provision is a proper exercise of a reserved power of the State, we submit, and should be supported even when it comes in conflict with a purported exercise of Congressional power. Such a provision will be improper if it discriminates against a Federal instrumentality; it would be void if it stands directly in the path of the direct exercise of one of the enumerated or implied powers of Congress to the extent of the impediment. So long, however, as it merely applies evenly to a Federal agency indulging in an incidental occupation which for its very existence depends upon state law and state action (as do the incidental powers of national banks) then the state regulation must control if the Tenth Amendment is to mean anything. We submit that the Constitution permits exercise of the reserved powers by the States so long as they do not discriminate against Federal agencies performing duties primarily subject to state supervision.

The question in the case at bar may seem too trivial to require such extended discussion. The question is one of a principle which, once established, will at least logically govern cases directly involving more immediate important results. The court below had declined to recognize as its

officer a corporation other than one which it appointed executor. The corporation demanding to be recognized (the appellant here) bases its contentions upon an Act of Congress purporting to give it the right to be recognized automatically as the successor of the original appointee. Congress here asserts that it possesses the power to substitute its determination for the judicial determination required by Massachusetts legislation. There is a clear assertion by Congress of its power to deal with a matter within the primary and exclusive powers of the States, thereby burdening and impeding materially the administration of justice within the State with respect to a matter actually regulated in non-discriminatory fashion by the Massachusetts legislature. The assertion of this power (to forward and to favor the exercise by a Federal agency of a non-Federal function under terms not granted to individuals or to state agencies by state law) raises a fundamental constitutional issue as to the power of the Federal Government to extend its control over matters left by the Constitution to the States, under the guise of forwarding one of the enumerated or implied powers under article I, section 8, of the Constitution. Such a question is not trivial and the appellant recognizes this fact in its brief at p. 9 *et seq.*), although there contending that Congress may give to national banks not only power to compete with state banks in fields primarily subject to state supervision, but may also give to national banks freedom from state supervision while performing duties as officers of the courts of the States (see appellant's brief, p. 25 *et seq.*). The statement of the proposition, we submit, shows the impropriety of referring to State sovereignty or powers in any sense if the appellant's contention be sustained by this Honorable Court. We submit that this Court has already recognized the truth of our contention that non-discriminatory state regulation of the business within the scope of the incidental powers of national banks controls

the exercise of those powers by national banks. See *Burnes National Bank* v. *Duncan*, 265 U.S. 17, 24, where Mr. Justice *Holmes* refers to the case of *First National Bank of Bay City* v. *Fellows*, 244 U.S. 416, 425, and mentions the incidental business of national banks as being in a general sense subject to the authority of the States to regulate such business. In the *Fellows* case Mr. Chief Justice *White* says at page 426:

> "Of course as the general subject of regulating the character of business just referred to is peculiarly within state administrative control, state regulations for the conduct of such business, if not discriminatory or so unreasonable as to justify the conclusion that they necessarily would so operate, would be controlling upon banks chartered by Congress when they came in virtue of authority conferred upon them by Congress to exert such particular powers" (see *supra*, p. 21).

This reasoning, we maintain, is conclusive as to the soundness of our contention.

There is one outstanding logical fallacy in the appellant's brief which must be mentioned here. The statement is made that, inasmuch as probate procedure may be regulated by statute by the legislative bodies of the several States, all probate matters are primarily administrative, and may therefore be dealt with by Congress, presumably because it is a legislature (appellant's brief, pp. 22-27, 31-33). Congress admittedly has legislative power with respect to the enumerated and implied powers. The States have all other legislative power by virtue of article X of the Amendments to the Constitution (with the exception of those powers expressly forbidden to the States by article I, section 10). The two are not coordinate except in so far as Congress may act to prevent the States from

using their "characteristic" powers to injure or to discriminate against some phase of the exercise of an admitted Congressional power. The mere fact that a state legislature may pass a legislative act (as opposed to a judicial determination) does not mean that Congress may also pass the same act. The argument of the appellant distorts the reasoning in the opinion below (1928 Mass. Adv. Sh. 1213, 1224; R. 15, 26, *et seq.*) that the disputed language in section 1 of the Act of February 25, 1927 (as construed below), results in an exercise of judicial power by a legislative body. The only legislature competent to act directly upon the subject of the administration of estates in Massachusetts is the Great and General Court of the Commonwealth. That legislature has declared certain determinations to be judicial in nature. When Congress, a legislative body, purports to deal with these determinations the unconstitutionality of the action rests primarily, not upon the interference of a legislative body with a judicial matter, but upon the interference of an incompetent legislative body in a matter beyond its powers except in some indirect and incidental respects.

Summary of Argument upon the Constitutionality of Section 1 of the Act of February 25, 1927.

The following propositions we believe to be unquestioned law:

1. Congress has power to join to the banking function of national banks all forms of business done by state institutions competing with national banks.

2. Primarily the whole subject of the administration of estates is a matter reserved to the several States, but—

(*a*) In so far as Congress, in the exercise of one of the enumerated or implied powers, directly affects the administration of estates, as *e.g.* the Federal Estate Tax, Federal interference is valid.

(*b*) In so far as the States permit competitors of Federal agencies to perform duties in connection with the administration of estates, Congress may provide that its agencies, more particularly national banks, shall not be deprived of an opportunity to compete.

3. Where Congressional interference with the administration of estates rests upon the preservation of the right of national banks to compete with state agencies, the power of Congress is limited to preservation of the right of national banks to compete upon a parity with state institutions.

The fourth proposition for which we contend as deciding this case is—

4. Where a national bank is exercising an incidental power (as outlined in 2 (*b*) and 3, *supra*), it must do so subject to all non-discriminatory state law and supervision pertinent to the exercise of the power.

5. The particular state regulation here in issue does not discriminate against national banks in favor of any other person, but is applied to all persons evenly. So far as section 1 of the Act of February 25, 1927, interferes with non-discriminatory Massachusetts probate law, section 1 is invalid.

CONCLUSION.

We contend, therefore—

(1) That section 1 of the Act of February 25, 1927, should be construed as permitting consolidated national banks to succeed to the court appointments as fiduciary held by state trust companies party to the consolidation, only so far as non-discriminatory state law permits and subject to the non-discriminatory provisions and procedural requirements of state probate law.

(2) That, if the construction of section 1 taken by the Supreme Judicial Court of Massachusetts be adopted by

this Court, section 1 as thus construed should be held to be an unconstitutional interference by Congress with matters the control of which is reserved to the several States, so far as section 1 purports to authorize or to require succession of consolidated national banks as fiduciary in contravention of or without compliance with non-discriminatory provisions of state law.

We submit that the final decree of the Probate Court for the County of Worcester, Massachusetts, should be affirmed.

Respectfully submitted,

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APPENDIX A.

Section 11 (*k*) of the Federal Reserve Act, as amended by section 2 of the Act of September 26, 1918 (40 STAT. AT L., pt. 1, pp. 968-969):

"SEC. 2. That section eleven (k) of the Federal reserve Act be amended and reenacted to read as follows:

"(*k*) To grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.

"Whenever the laws of such State authorize or permit the exercise of any or all of the foregoing powers by State banks, trust companies, or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of State or local law within the meaning of this Act.

"National banks exercising any or all of the powers enumerated in this subsection shall segregate all assets held in any fiduciary capacity from the general assets of the bank and shall keep a separate set of books and records showing in proper detail all transactions engaged in under authority of this subsection. Such books and records shall be open to inspection by the State authorities to the same extent as the books and records of corporations organized under State law which exercise fiduciary powers, but nothing in this Act shall be construed as authorizing the State authorities to examine the books, records, and assets of the national bank which are not held in trust under authority of this subsection.

"No national bank shall receive in its trust department deposits of current funds subject to check or the deposit of checks, drafts, bills of exchange, or other items for collection or exchange purposes. Funds deposited or held in trust by the bank awaiting investment shall be carried in a separate account and shall not be used by the bank in the conduct of its business unless it shall first set aside in the trust department United States bonds or other securities approved by the Federal Reserve Board.

"In the event of the failure of such bank the owners of the funds held in trust for investment shall have a lien on the bonds or other securities so set apart in addition to their claim against the estate of the bank.

"Whenever the laws of a State require corporations acting in a fiduciary capacity, to deposit securities with the State authorities for the protection of private or court trusts, national banks so acting shall be required to make similar deposits and securities so deposited shall be held for the protection of private or court trusts, as provided by the State law.

"National banks in such cases shall not be required to execute the bond usually required of individuals if State corporations under similar circumstances are exempt from this requirement.

"National banks shall have power to execute such bond when so required by the laws of the State.

"In any case in which the laws of a State require that a corporation acting as trustee, executor, administrator, or in any capacity specified in this section, shall take an oath or make an affidavit, the president, vice president, cashier, or trust officer of such national bank may take the necessary oath or execute the necessary affidavit.

"It shall be unlawful for any national banking association to lend any officer, director, or employee any funds held in trust under the powers conferred by this section. Any officer, director, or employee making such loan, or to

whom such loan is made, may be fined not more than $5,000, or imprisoned not more than five years, or may be both fined and imprisoned, in the discretion of the court.

"In passing upon applications for permission to exercise the powers enumerated in this subsection, the Federal Reserve Board may take into consideration the amount of capital and surplus of the applying bank, whether or not such capital and surplus is sufficient under the circumstances of the case, the needs of the community to be served, and any other facts and circumstances that seem to it proper, and may grant or refuse the application accordingly: *Provided*, That no permit shall be issued to any national banking association having a capital and surplus less than the capital and surplus required by State law of State banks, trust companies, and corporations exercising such powers."

APPENDIX B.

General Laws of Massachusetts, c. 193, §7, as amended by St. 1921, c. 64:

"SECTION 7. If no executor is named in a will, or if all the executors therein named are dead or incompetent or refuse to accept the trust, or if, after being duly cited therefor, the executor neglects to accept the trust, or if he neglects for thirty days after the probate of the will to give bond according to law, the court shall commit administration of the estate, with the will annexed, to any person interested in the will of said deceased, to any creditor of the deceased or to any suitable person; but after the expiration of said thirty days, and before letters of administration with the will annexed have been granted, the court may grant letters testamentary to any person named as executor who gives the bond required by law. If a person named as executor in a will petitions for the probate of the same and dies, declines or becomes unable to act before final decree is entered on said petition, any person interested in the will of said deceased, or any creditor of the deceased, or any suitable person, may, on petition, be allowed to enter and to prosecute the original petition for probate, to apply for letters of administration with the will annexed, and to act and proceed in any proposed compromise under sections fifteen and sixteen of chapter two hundred and four. If it appears that there are no known heirs or legatees or devisees under the will of the deceased, a public administrator of the county shall be appointed to the trust."

APPENDIX C.

General Laws of Massachusetts, c. 172, §§ 49-59 (§52 as amended by St. 1928, c. 128, §2):

"SECTION 49. Every such corporation acting under any provision of the following section or section fifty-two shall have a trust department in which all business authorized by said sections shall be kept separate and distinct from its general business.

"SECTION 50. A court of law or equity, or a court of probate and insolvency of the commonwealth, may direct that money or property under its control, or which may be paid into court by parties to any legal proceedings, or which may be brought into court by reason of an order or judgment, be deposited with such corporation, upon such terms and subject to such instructions as the court may prescribe. When money so deposited has remained unclaimed for more than ten years, the court may upon motion of the attorney general order and decree that it shall be paid over to the state treasurer to be held by him under the terms of said order or decree, and upon the entry of such order or decree the corporation shall pay over money so deposited and specified in the order to the state treasurer, to be held by him as aforesaid; and if any person shall establish a lawful right thereto the said treasurer shall repay the same to such person, with interest at the rate of three per cent per annum from the time when paid to said treasurer to the time when it is paid over by him to such person. Sections forty-two and forty-three of chapter one hundred and sixty-eight shall be applicable to trust companies. Such corporation may also hold money or property in trust or on deposit from executors, administrators, assignees, guardians, conservators and trustees, upon such terms and conditions as may be agreed upon.

"SECTION 51. Money or property received under the preceding section shall be loaned on or invested only in

the authorized loans of the United States, or any of the New England states, counties, cities or towns thereof, or of the states of Illinois, Iowa, Michigan, Minnesota, Wisconsin, or the counties or cities thereof, or stocks of state or national banks situated within this commonwealth, or in the first mortgage bonds of a railroad corporation incorporated in any of the New England states whose road is located wholly or in part in the same and which has earned and paid regular dividends on all its issues of capital stock for two years last preceding such loan or investment, or in the bonds of any such railroad company unencumbered by mortgage, or in first mortgages on real estate in this commonwealth, or in any securities in which savings banks may invest, or upon notes with two sureties of domestic manufacturing corporations or of individuals with a sufficient pledge as collateral of any of the aforesaid securities; but all real estate acquired by foreclosure of mortgage or by levy of execution shall be sold at public auction within two years after such foreclosure or levy.

"Section 52. Such corporation may be appointed executor of a will, codicil or writing testamentary, administrator with the will annexed, administrator of the estate of any person, receiver, assignee, guardian, conservator or trustee under a will or instrument creating a trust for the care and management of property, under the same circumstances, in the same manner, and subject to the same control by the court having jurisdiction of the same, as a legally qualified individual. Any such appointment as guardian shall apply to the estate and not to the person of the ward. Such corporation shall not be required to receive or hold property or money or assume or execute a trust under this section or section fifty without its assent. The words 'such corporation' as used in this section and in sections fifty-three to fifty-nine, inclusive, shall, so far as applicable, include any banking association or corpo-

ration holding a certificate under section forty-five A of chapter one hundred and sixty-seven.

"SECTION 53. Every such corporation may invest the funds or assets which it may receive and hold under the preceding section in the same way, to the same extent, and under the same restrictions as an individual holding a similar position may invest such funds or assets.

"SECTION 54. Money, property or securities received, invested or loaned under the provisions of sections fifty to fifty-two, inclusive, shall be a special deposit in such corporation, and the accounts thereof shall be kept separate. Such funds and the investment or loans thereof shall be specially appropriated to the security and payment of such deposits, shall not be mingled with the investments of the capital stock or other money or property belonging to such corporation, or be liable for the debts or obligations thereof.

"SECTION 55. The capital stock of such corporations, with the liabilities of the stockholders thereunder, shall be held as security for the faithful performance of the duties undertaken by virtue of sections fifty to fifty-two, inclusive, or of any similar provision of law.

"SECTION 56. No such corporation shall commence to exercise the powers and duties described in sections fifty to fifty-two, inclusive, until it has received written authority therefor from the board of bank incorporation, and said board may grant or refuse such authority after such investigation of the affairs of the corporation as it deems expedient.

"SECTION 57. In all proceedings in the probate court or elsewhere, connected with any authority exercised under section fifty or fifty-two, or under any similar provisions of law, all accounts, returns and other papers may be signed and sworn to, in behalf of the corporation, by any officer thereof duly authorized by it, and the answers and examinations under oath of said officer shall be received

as the answers and examinations of the corporation. The court may order and compel an officer of such corporation to answer and attend said examination in the same manner as if he, instead of the corporation, were a party to the proceeding.

"SECTION 58. No surety shall be required upon the bonds filed by such corporation as fiduciary under section fifty-two except that the court making an appointment under said section, other than of a trustee, may, upon application by an interested person, require the corporation so appointed to give such security, in addition to that provided by section fifty-five, as the court may consider proper, and upon failure of such corporation to give the security required, may revoke such appointment and remove such corporation.

"SECTION 59. A person creating a trust may direct whether money or property deposited under it shall be held and invested separately or invested in the general trust fund of the corporation; and such corporation acting as trustee shall be governed by directions contained in the will or instrument under which it acts."

APPENDIX D.

General Laws of Massachusetts, c. 156, §§ 42 and 46:

"SECTION 42. Every corporation may, at a meeting duly called for the purpose, by vote of two thirds of each class of stock outstanding and entitled to vote, or by a larger vote if the agreement of association or act of incorporation so requires, change its corporate name, the nature of its business, the classes of its capital stock subsequently to be issued and their preferences and voting power, or make any other lawful amendment or alteration in its agreement of association or articles of organization, or in the corresponding provisions of its act of incorporation, or authorize the sale, lease or exchange of all its property and assets, including its good will, upon such terms and conditions as it deems expedient.

* * * * * * * * * *

"SECTION 46. A stockholder in any corporation which shall have duly voted to sell, lease or exchange all its property and assets or to change the nature of its business in accordance with section forty-two, who, at the meeting of stockholders, has voted against such action may, within thirty days after the date of said meeting, make a written demand upon the corporation for payment for his stock. If the corporation and the stockholder cannot agree upon the value of the stock at the date of such sale, lease, exchange or change, such value shall be ascertained by three disinterested persons, one of whom shall be named by the stockholder, another by the corporation and the third by the two thus chosen. The finding of the appraisers shall be final, and if their award is not paid by the corporation within thirty days after it is made, it may be recovered in contract by the stockholder from the corporation. Upon payment by the corporation to the stockholder of the agreed or awarded price of his stock, the stockholder shall

forthwith transfer and assign the stock certificates held by him at, and in accordance with, the request of the corporation."

APPENDIX E.

To the Honorable the Judges of the Probate Court in and for the County of Worcester:

Respectfully represents *X Trust Company* of *X* in the County of Worcester, that the will of *John Doe* late of *Worcester* in said County of Worcester, deceased, was duly proved and allowed on the *tenth* day of *January* A.D. *1920*, in said Court, and that *the Y Trust Company was* appointed executor thereof, and that said executor has *ceased to do business* without having fully executed said will and that your petitioner is *its successor by consolidation under the provisions of G.L. c. 172 § 44 as amended by St. 1922, c. 292*

Wherefore your petitioner pray that *it*, or some other suitable person, be appointed administrator with the will annexed of the estate of said deceased not already administered, *and Richard Roe, its trust officer, hereunto duly authorized* certifies that the statements herein contained are true to the best of his knowledge and belief.

Dated this *10th* day of *January* A.D. 1929.

THE X TRUST COMPANY
(sgd) by Richard Roe, Trust Officer

Worcester, ss. Subscribed and sworn to this *10th* day of *January* A.D. 1929.

Before me,

Justice of the Peace.

The undersigned, being all the persons interested, hereby assent to the foregoing petition.

(Note: The words above in italics are inserted by us to show an appropriate method of filling out the form of petition for appointment as administrator *de bonis non* with the will annexed.)

COMMONWEALTH OF MASSACHUSETTS.

WORCESTER, ss.

PROBATE COURT.

To the devisees, legatees, and all other persons interested in the estate of late of in said County, deceased, testate:

Whereas, a petition has been presented to said Court to grant a letter of administration with the will annexed, on the estate of said deceased not already administered, to of in the County of Worcester, or to some other suitable person.

You are hereby cited to appear at a Probate Court to be held at Worcester, in said County of Worcester, on the day of A.D. 192 , at ten o'clock in the forenoon, to show cause, if any you have, why the same should not be granted.

And said petitioner is hereby directed to give public notice thereof by publishing this citation once in each week, for three successive weeks, in the a newspaper published in the last publication to be one day, at least, before said Court, and by mailing, postpaid, or delivering a copy of this citation to all devisees and legatees named in said will, seven days at least before said Court.

Witness, FREDERICK H. CHAMBERLAIN, Esquire, First Judge of said Court, this day of in the year one thousand nine hundred and twenty.

Register.

I have served the foregoing citation as therein ordered by publishing and mailing—delivering.

WORCESTER, ss. _____ A.D. 192 . Then personally appeared _____ and made oath that the above return by h subscribed is true.

Before me,

_____ Justice of the Peace.

COMMONWEALTH OF MASSACHUSETTS.

WORCESTER, ss.

At a Probate Court holden at Worcester _____ in and for said County of Worcester, on the _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-

On the petition of _____ of _____ in the County of Worcester, _____ praying that he , or some other suitable person, be appointed administrat with the will annexed, of the estate not already administered, of _____ late of _____ in said County of Worcester, _____ deceased, _____ it appearing that the will of said deceased was duly proved and allowed, on the _____ day of _____ A.D. 1 , by said Court and that _____ w appointed execut _____ thereof, and _____ ha since _____ without having fully executed said will. All persons interested _____ having been notified according to the order of Court, and no person objecting thereto:

It is decreed that said petitioner _____ be appointed administrat with the will annexed, of said estate not already administered, he first giving bond with _____ sufficient sureties for the due performance of said trust.

_____ Judge of Probate Court.

APPENDIX F.

Massachusetts Acts of 1911, c. 128 (sections pertinent to this case only. Sections 2, 4, 5, 6, and 7 not printed):

"SECTION 1. The Old Colony Trust Company, the Massachusetts Trust Company, the Mercantile Trust Company and the City Trust Company may apply to the board of bank incorporation for authority to merge, and if the board shall grant such authority the respective boards of directors of said trust companies may make an agreement for the merger of the Massachusetts Trust Company, the Mercantile Trust Company and the City Trust Company in the Old Colony Trust Company, prescribing the terms and conditions thereof and the mode of carrying the same into effect, which agreement shall be subject to the approval of the bank commissioner.

* * * * * * * * *

"SECTION 3. *No such merger shall work a dissolution of any of said trust companies or a termination of their several corporate existences or of their franchises*, but the corporate existence of each trust company so merged shall be continued by the Old Colony Trust Company, and all their privileges and franchises and all their rights, titles and interests in and to any species of property and things in action shall forthwith without any deed or transfer be vested in said Old Colony Trust Company to hold and enjoy in the same manner and to the same extent as the said trust companies so merged had formerly held and enjoyed the same; but the several merged trust companies may in their discretion execute one or more deeds or instruments of conveyance transferring or confirming all their rights, titles and interests aforesaid to the Old Colony Trust Company. The rights of creditors of any trust company so merged shall not in any manner be impaired by any such merger, and the Old Colony Trust Company shall upon such merger continue to exercise and be subject to

all the duties, relations, obligations, trusts and liabilities of such merged trust companies whether as debtor, depositary, registrar, transfer agent, executor, administrator, trustee or otherwise, and be held liable to pay and discharge all such debts and liabilities, and to perform all such duties and trusts, in the same manner and to the same extent as if said Old Colony Trust Company had itself incurred the obligation or liability or assumed the duty, relation or trust, and no suit, action or other proceeding then pending before any court or tribunal in which any trust company that may be so merged is a party shall be deemed to have abated or to have been discontinued by reason of such merger." (Italics ours.)

* * * * * * * * *

APPENDIX G.

Regulation F (in part), Series of 1928, published in Fourteenth Annual Report of the Federal Reserve Board, 1927, p. 286 *et seq.*

"The purpose of this provision is to make clear the right of such a consolidated national bank to succeed to the specific trusteeships, executorships, and other fiduciary appointments under which the State institution was acting prior to the consolidation or in which it had been appointed or designated to act under wills or other instruments which had not become effective at the time of consolidation through the death of a testator, the probate of a will, or otherwise; *but it does not confer upon such national banks the right to act generally in fiduciary capacities or to undertake any new trust business. It is necessary for the consolidated national bank to have a permit from the Federal Reserve Board to act in fiduciary capacities, therefore, before undertaking to act generally in fiduciary capacities or to accept any new trust business.* If the national bank does not desire to act generally in fiduciary capacities or to accept any new trust business, but desires merely to continue to execute the specific trusteeships, executorships, and other fiduciary affairs which were actually being executed by the State institution at the time of the consolidation or which the State institution had been designated to execute under wills or other instruments which had not yet become effective through the death of the testator, the probate of the will, or otherwise, it is not technically necessary for the national bank to have a permit from the Federal Reserve Board in order to execute such specific trusts; but it is advisable for the national bank to have such a permit, in order that its right to continue to execute these trusts may not be questioned. In all cases involving the consolidation of a State institution

having a trust business with a national bank under the provisions of the above-mentioned act, therefore, the national bank should obtain from the Federal Reserve Board a permit to act in fiduciary capacities before the consolidation becomes effective, unless such national bank already has such a permit." (Italics ours.)

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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 469

EX PARTE WORCESTER COUNTY NATIONAL BANK, OF Worcester, a corporation, appellant, In Re estate of Julia A. Legnard

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIÆ

May it please the Court:

The undersigned, as Counsel for the Comptroller of the Currency, respectfully move this Honorable Court for leave to file the accompanying brief in this case as amicus curiae.

F. G. AWALT,
Counsel for the Comptroller of the Currency.

GEORGE P. BARSE,
Assistant Counsel
for the Comptroller of the Currency.

In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 469

EX PARTE WORCESTER COUNTY NATIONAL BANK OF Worcester, a Corporation, appellant

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IN RE ESTATE JULIA A. LEGNARD

BRIEF OF THE COMPTROLLER OF THE CURRENCY AS AMICUS CURIÆ

Comes now John W. Pole, Comptroller of the Currency of the United States, and, by leave of Court first had and obtained respectfully submits his brief, as amicus curiæ.

INTEREST OF THE COMPTROLLER OF THE CURRENCY IN THE CASE

The Comptroller of the Currency is charged with the general supervision of the National banking system. He supervises the formation of the banks, the issue, security and redemption of their notes, their condition as going banks and in event of insolvency the winding up of their affairs. He is

charged with the approval of conversions of State into National banks, and the consolidation of national banks and of State with National banks. There has also been placed upon him the duty of recommending to Congress any amendment to the laws relative to banking by which the system may be improved. Any matter which may adversely affect the integrity of the National banking system is his concern. This case not only affects the true construction of a Federal statute enacted upon his recommendation to improve, strengthen and safeguard the National system, but involves the integrity of such system.

This decision, as hereinafter set forth, has already seriously affected the National banking system and will have a far reaching effect in the future.

The purpose of this brief is to invite the court's attention, as throwing light upon the construction of the Federal statute under consideration, to the conditions anterior to the passage of the statute sought to be remedied thereby, the relation of those conditions and the relief sought to the National banking system, and to the fundamental principles of National bank law which the Comptroller feels should control in disposing of the questions in issue. No extended citation of authorities in support of detailed argument will be attempted. Being in full accord with the arguments and reasoning of the appellant, it is deemed unnecessary here to reiterate what is there said.

SUMMARY OF FACTS

The facts in the case, which are set out in more detail in appellant's brief, may be stated here briefly as follows: On April 21, 1926, the Fitchburg Bank and Trust Company, a corporation organized under the laws of Massachusetts, was appointed executor of the will of Julia A. Legnard by the Probate Court of Worcester County, Massachusetts. (Record, pp. 3, 5, and 7.) On June 27, 1927, a certificate was issued by the Comptroller of the Currency approving the consolidation of the Merchants National Bank of Worcester, Massachusetts, and the Fitchburg Bank and Trust Company. The consolidated bank took the name of Worcester County National Bank of Worcester. This consolidation was effected under the national charter pursuant to a provision of the Act of Congress of February 25, 1927, Chapter 191, Sec. 1, 44 Stat. 1225, 12 U. S. C. Chapter 2, Sec. 34(a), providing for the consolidation of any bank incorporated under the laws of any State, or any bank incorporated in the District of Columbia, with a national banking association located in the same county, city, town or village, under the charter of such National banking association under certain conditions, and providing further that the

> consolidated national banking association shall hold and enjoy the same and all rights of property, franchises, and interests *including the right of succession as trustee, execu-*

> *tor, or any other fiduciary capacity in the same manner and to the same extent as was held and enjoyed by such State* or District bank so consolidated with such national banking association.

Thereafter on the 11th day of February, 1928, the Worcester County National Bank of Worcester attempted to file the first and final account of the Fitchburg Bank and Trust Company as executor covering a period between the 21st day of April, 1926, and the 9th day of February, 1928. The account was rendered for the trust company to June 27, 1927, and thereafter as the national bank's own account. (Record, p. 8.) The Probate Judge found that the account was in proper form and should be allowed if the Worcester County National Bank, as successor or otherwise, was executor of the will, or had the right to render the account under the laws of the United States. (Record, p. 12.) He further stated, "Without action upon said account, I report the above facts and the question of law involved, for the consideration and determination of the full court, as to whether the petitioner is entitled to render said account." (Record, p. 13.) Thereafter on May 24, 1928, the Supreme Judicial Court of Massachusetts answered the question submitted in the negative, holding the Federal statute involved unconstitutional, in so far as said statute provided for the succession of the consolidated bank as executor by operation of law, and instructed

the Probate Court accordingly. (Record, p. 30.) Pursuant to these instructions the Probate Court of Worcester County entered upon its docket a dismissal of the petition for the allowance of the account.

CONDITIONS SOUGHT TO BE REMEDIED BY THE STATUTE, THE RELIEF SOUGHT, AND THE RELATION OF THE SAME TO THE NATIONAL SYSTEM

The particular provision of legislation here called into question forms a part of the Act entitled "An Act to Further Amend the National Banking Laws and the Federal Reserve Act and for other Purposes," approved February 25, 1927. (C. 191, Sec. 1, 44 Stat. 1225, Title 12, U. S. C., C. 2, Sec. 34 (a).) This Act followed upon urgent recommendation by the Comptroller of the Currency in his annual reports to Congress for the years 1924, 1925, and 1926.

In the six years preceding the passage of the Act, the National system lost more than $2,230,000,000 in resources to the State system. This was due in a large measure to the comparative inflexibility of the National system which did not enable National banks to give complete modern banking service and meet the competition of the various State systems. Moreover since there was no provision of law allowing State institutions to consolidate directly with National banks under National charter, National banks were leaving the system to merge with State institutions under State charter. Congress,

recognizing the trend toward mergers and consolidations among financial institutions, and the fact that competing State institutions were permitted to consolidate under the laws of various states, sought a method to strengthen and preserve the Federal System.

It was realized that to penalize the State bank willing to consolidate with a National bank by taking away its existing trust and fiduciary business would defeat such consolidation under Federal charter and result, where the National bank desired to go through with the merger, in the National bank leaving the Federal system. The Federal statute sought to remedy this by specifically providing that where a State bank consolidates with a National bank under the latter's charter, the consolidated institution should take over, not only all property rights of the State bank and the right to continue in the future its trust and fiduciary business, but also the right, as an incident to the transfer, and by virtue of the fact of consolidation, to continue and to succeed to the existing trusts and fiduciary business already upon the books of the State bank, the provisions of the Federal statute in that respect being as follows:

> * * * and all the rights, franchises, and interests of such State or District bank so consolidated with a national banking association in and to every species of property, real, personal, and mixed, and choses in action thereto belonging, shall be deemed to

be transferred to and vested in such national banking association into which it is consolidated without any deed or other transfer, *and the said consolidated national banking association shall hold and enjoy the same and all rights of property, franchises, and interest including the right of succession as trustee, executor, or in any other fiduciary capacity in the same manner and to the same extent as was held and enjoyed by such State or District bank so consolidated with such national banking association.*

The decision of the Supreme Judicial Court of Massachusetts in the instant case has the effect of nullifying the very purpose of the statute as enacted by Congress. In substance it denies the right to take over trust and fiduciary business already upon the books of the State institution and requires the consolidated bank to relinquish such business and enter into competition with others for such business. The State institution acting under the appointments as trustee, executor, or in any other fiduciary capacity, and often with ambulatory wills on hand, naming it as executor or other fiduciary, will not consolidate under the National charter if there is any doubt that the proposed consolidation will be legally entitled to continue to transact this business or if in order to transact business it is necessary to go into court or otherwise obtain and seek reappointments for the consolidated institution. The result is that the National bank having no such

complications, goes out of the system in order to make the merger.

In this connection the court's attention is directed to the fact that two of the largest and strongest national banks in the Western part of the United States are merging with State trust companies under the charter of the State institution. In both of these cases the Comptroller of the Currency has been reliably informed that the sole reason for the mergers under the State charters is the decision of the lower court in this case and the consequent refusal of the trust companies handling large estates and trusts to seek the reappointment for the consolidated institution apparently necessary under the National charter. Moreover there are at least three known consolidations awaiting the decision of this court in this case; each involving the surrender of a National charter, if the right of succession is held not to exist.

It may be reasonably anticipated in the light of the present effect upon the National system of the decision of the Massachusetts court that if the decision is allowed to stand the National system will be greatly weakened and impaired. This is especially true in view of the large and constant growth of the fiduciary business among banks.

FUNDAMENTAL PRINCIPLES OF THE NATIONAL BANKING SYSTEM HERE INVOLVED

It is, of course, no longer open to question: That Congress has the power to provide for the creation

of National Banks as Federal Agencies, and to prescribe the scope of their powers to the extent considered necessary for efficient operation and successful competition with State Banks; that such authority of Congress is paramount, and can not be restricted or nullified by the States, either by legislative action or by judicial decision; and that among the powers thus properly conferred by Congress upon National Banks is the right to exercise trust and fiduciary functions—*McCullouch* v. *Maryland*, 4 Wheat. 316; *Osborne* v. *Bank*, 9 Wheat. 738; *First National Bank* v. *Fellows*, 244 U. S. 416; *Burnes National Bank* v. *Duncan*, 265 U. S. 17.

It is also no longer open to question that the consent of the State is not necessary as a condition precedent, to the State institution going into the National System by conversion (*Casey* v. *Galli*, 94 U. S. 673, 678), and with reference to the consolidation of the State Bank with the National Bank in the instant case the court below, in its opinion, said:

> We are unable to perceive any sound distinction between the power of Congress to authorize the conversion of a State Bank into a national bank and its power to authorize the consolidation of a State bank with a national bank under the charter of the national bank. If no State legislation was necessary to accomplish such conversion, it seems to us that no State legislation is necessary to accomplish such consolidation. Re-

> lying upon the authority of *Casey* v. *Galli*, 94 U. S. 673, we are of opinion that in general consolidation of a Massachusetts trust company with a national banking association as prescribed in the Act of Congress of February 25, 1927, c. 191, § 3, is permissible and valid.

In view of the foregoing it would seem logical to conclude that all appointments by State courts of State banks to trusts and fiduciary capacities must be considered to have been made subject to the reserved and paramount power of Congress, to create, control, supervise, and extend the National Banking system and as an incident thereto to provide for the State Banks coming into the National System, whether by conversion into a National Bank without consolidation (as in *Casey* v. *Galli*) or by conversion through consolidation, and for the passage by operation of the enabling statute of all property, rights, and privileges to the reorganized bank. The principle would seem to be the same in either event, and if the consent of the State is not necessary in the case of conversion *without* consolidation it would seem to be clearly unnecessary in conversion *through* consolidation.

That there is no special or peculiar feature inherent in the office of executor or administrator or other fiduciary capacity which can impede the plenary action of Congress in thus exercising its paramount authority in protecting and strengthening the National Banking System would seem to be

clearly indicated in the case of *Burnes National Bank* v. *Duncan*, 265 U. S. 17, 24. In that case the National Bank filed mandamus to compel the State Probate Court to issue to it letters testamentary, it having been nominated executor under a will. Appointment by the Probate Court was denied on the ground that by the laws of the State, National Banks were not authorized to act as executors. The National Bank claimed the right to so act under the provisions of the Act of September 26, 1918 c. 177, § 2, 40 Stat. 967, 968 amending § 11 (k) of the Federal Reserve Act, wherein the Federal Reserve Board had been empowered by Congress to grant, by special permit to National Banks applying therefor, when not in contravention of State or local law, "the right to act as trustee, executor, administrator * * * or in any other fiduciary capacity in which State Banks, trust companies or other corporations which come into competition with National Banks are permitted to act under the laws of the State in which the National Bank is located," said statute further providing that whenever the laws of the State permitted the exercise of such powers by State Banks or trust companies or other corporations which were in competition with National Banks, the granting of such powers under the Federal statute to National Banks should not be deemed to be in contravention of the State law. In construing this statute this court said:

> Now that Congress has expressed its paramount will this language is more apposite

than ever. The States can not use their most characteristic powers to reach unconstitutional results. (*Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1. *Pullman Co.* v. *Kansas*, 216 U. S. 56. *Western Union Telegraph Co.* v. *Foster*, 247 U. S. 105, 114.) There is nothing over which a State has more exclusive authority than the jurisdiction of its courts, but it can not escape its constitutional obligations by the device of denying jurisdiction to courts otherwise competent. (*Kenney* v. *Supreme Lodge of the World*, 252 U. S. 411, 415.) *So here—the State can not lay hold of its general control of administration to deprive national banks of their power to compete that Congress is authorized to sustain.* (Italics inserted.)

The objection that the consolidated institution is a different corporation from the one originally vested with the trust or fiduciary appointment, is at most purely technical, and substance rather than form should govern. It is not questioned that it was intended by Congress, by virtue of the specific provisions of the statute, that every species of property, real, personal and mixed, choses in action, and rights of every character "including the right of succession as trustee, executor, or in any other fiduciary capacity in the same manner and to the same extent as was held and enjoyed by such State or district bank so consolidated with such national banking association" should be considered as vested

in the consolidated institution without necessity for any deed or other transfer. For all practical purposes the identity of the State institution was preserved just as much as though Congress in specific terms had so provided. Furthermore, it can not be questioned that the consolidated institution is subject to all the liabilities of the State Bank including the liability of accounting for the assets of the various estates which were being handled by the State bank in its trust or fiduciary capacity and the liability, if any, of said State institution for previous mismanagement of said trust estates, and, consequently it is only logical to conclude, in that connection, that the consolidated bank so far as said trust estates are concerned, takes over the rights and emoluments and offices incident thereto, including the right to continue to exercise such functions in existing cases until discharged in due course or otherwise displaced by proper court action.

CONCLUSION

Congress, in the exercise of its paramount power, has unmistakably indicated its intention that the consolidated institution should succeed to the rights of the State institution to continue to exercise the trust and fiduciary functions in question. Congress has deemed the right to exercise such powers a necessary incident to the consolidation in order to give it practical effect, and has deemed the right of such consolidation to be essential to the protec-

tion of the National System and to enable it to withstand the competition of the State system. It is not believed that it is within the power of the State to nullify the intent of Congress.

F. G. AWALT,
Counsel for the Comptroller of the Currency.
GEORGE P. BARSE,
Assistant Counsel
for the Comptroller of the Currency.

No. 469

In the Supreme Court of the United States

OCTOBER TERM, 1926

EX PARTE WORCESTER COUNTY NATIONAL BANK, OF WORCESTER, A CORPORATION, APPELLANT

IN RE ESTATE OF JULIA A. LEONARD

MOTION OF FEDERAL RESERVE BOARD FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AS AMICUS CURIAE

WALKER WYATT,
General Counsel, Federal Reserve Board,
GEORGE B. VEST,
Assistant General Counsel, Federal Reserve Board.

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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 469

EX PARTE WORCESTER COUNTY NATIONAL BANK, of Worcester, a corporation, appellant

---

IN RE ESTATE OF JULIA A. LEGNARD

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIÆ

May it please the Court:

The undersigned, as Counsel for the Federal Reserve Board, respectfully move this Honorable Court for leave to file the accompanying brief in this case as amicus curiæ.

WALTER WYATT,
General Counsel, Federal Reserve Board.

GEORGE B. VEST,
Assistant Counsel, Federal Reserve Board.

In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 469

EX PARTE WORCESTER COUNTY NATIONAL BANK, OF Worcester, a Corporation, appellant

---

IN RE ESTATE OF JULIA A. LEGNARD

BRIEF OF THE FEDERAL RESERVE BOARD AS AMICUS CURIÆ

With leave of the Court, the Federal Reserve Board files this brief as amicus curiæ.

PRELIMINARY STATEMENT

The outcome of this case is a matter of grave concern to the Federal Reserve System. If the decision of the Supreme Judicial Court of Massachusetts is not reversed, an increasing number of national banks will be lost to the National Banking System, which will indirectly result in loss in membership of the Federal Reserve System, both in

numbers and in resources. The result will be a gradual weakening of the Federal Reserve System, with a corresponding impairment of efficiency in carrying out the purposes for which it was created.

FACTS

The facts in the case, which are set out in more detail in appellant's brief, may be stated here briefly as follows: On April 21, 1926, the Fitchburg Bank and Trust Company, a corporation organized under the laws of Massachusetts, was appointed executor of the will of Julia A. Legnard by the Probate Court of Worcester County, Massachusetts, pursuant to the provisions of the will. (Record, pp. 3, 5, and 7.) The probate was allowed on April 21, 1926. Thereafter on June 27, 1927, a certificate was issued by the Comptroller of the Currency approving the consolidation of the Merchants National Bank of Worcester, Massachusetts, and the Fitchburg Bank and Trust Company. The consolidated bank took the name of Worcester County National Bank of Worcester. This consolidation was effected under national charter pursuant to a provision of the Act of Congress of February 25, 1927, Chapter 191, Sec. 1, 44 Stat. 1225, 12 U. S. C. Chapter 2, Sec. 34 (a), providing for the consolidation of any bank incorporated under the laws of any State, or any bank incorporated in the District of Columbia, with a national banking association located in the same county, city, town or village, under the charter of such national banking associa-

tion under certain conditions, and providing further that the "consolidated national banking association shall hold and enjoy the same and all rights of property, franchises, and interests including the right of succession as trustee, executor, or any other fiduciary capacity in the same manner and to the same extent as was held and enjoyed by such State or District bank so consolidated with such national banking association."

Thereafter on the 11th day of February, 1928, the Worcester County National Bank of Worcester attempted to file the first and final account of the Fitchburg Bank and Trust Company as executor covering a period between the 21st day of April, 1926, and the 9th day of February, 1928. The account was rendered for the trust company to June 27, 1927, and thereafter as the national bank's own account. (Record, p. 8.) The Probate Judge found that the account was in proper form and should be allowed if the Worcester County National Bank, as successor or otherwise, is executor of the will, or has the right to render the account under the laws of the United States. (Record, p. 12.) He further stated, "Without action upon said account, I report the above facts and the question of law involved, for the consideration and determination of the Full Court, as to whether the petitioner is entitled to render said account." (Record, p. 13.) Thereafter on May 24, 1928, the Supreme Judicial Court of Massachusetts answered the question submitted in the negative, holding the Federal statute

involved unconstitutional, and instructed the Probate Court accordingly. (Record, p. 30.) Pursuant to these instructions the Probate Court of Worcester County entered upon its docket an item dismissing the petition for the allowance of the account.

IMPORTANCE OF DECISION TO FEDERAL RESERVE SYSTEM

The purpose of this brief is to show to the court the interest of the Federal Reserve Board in this case and especially the importance of its outcome to the entire Federal Reserve System. National Banks, all of which under the law are members of the Federal Reserve System, constitute by far the greater number of the Federal reserve membership, the State banks being in comparatively small proportion; and accordingly any factor which seriously affects national banks is a matter of correspondingly serious importance to the Federal Reserve System.

It is not intended in this brief to argue the strictly legal points involved in the case. The constitutionality of the statute before the court is thoroughly covered in appellant's brief and the arguments made in that brief, it is submitted, are conclusive of the authority of Congress under the Constitution to enact this legislation. Being in full accord with the arguments and reasoning in the brief of appellant, it is deemed unnecessary here to reiterate what is there said.

In the past few years there has been an increasing tendency toward consolidation of financial institutions. If national banks are to live and survive side by side with State institutions, they must be enabled to consolidate under national charter with State banks as well as with other national banks on terms preserving to the consolidated national banks the right to continue the execution of the fiduciary business on the books of the constituent State banks. A State trust company planning to consolidate with a national bank is usually acting under appointments as trustee, executor, or in other fiduciary capacities and also usually has on hand ambulatory wills naming it as executor or other fiduciary, and the important question arises whether the proposed consolidated bank will be legally entitled to continue to transact this business. If it is thought that there will be doubt on this point in the event that the consolidation is effected under national charter, then the decision will be to consolidate not under national charter but under State charter, where the trust business may be preserved to the consolidated institution without legal entanglements. The national banking system will thus lose a member, and often members lost in this way are among the largest and most important banks because among institutions of this class consolidations frequently occur.

It is true that the loss of a member of the national banking system through such consolidations may not necessarily mean the loss of a member of the

Federal Reserve System; the consolidated State institution may elect to become a member of the Federal Reserve System and may apply and be admitted to the system. On the other hand, it may decide to remain outside the Federal Reserve System. Even if it elects to become a member, however, its membership as a State Bank is then optional and it is permitted under the law to withdraw from the system when it desires to do so after giving the required statutory notice. It will thus readily be seen that continued loss of membership in the national banking system through consolidations under State charter may in time bring about a serious defection both in numbers and in resources of the Federal Reserve membership. It was to prevent such losses to the national banking system and thus indirectly to the Federal Reserve System that Congress enacted the statute authorizing the consolidation under national charter of a State bank with a national bank, preserving to the consolidated national bank the trust business of the State institution.

It is obvious that if the Federal Reserve System is to continue to carry out the purposes for which it was created and is to continue to provide the credit and currency facilities contemplated by Congress in establishing the System, it is essential that it retain within its limits a sufficient membership in point of numbers and of resources to enable it to function efficiently in these directions. A gradual depletion in its membership will bring with it a

corresponding weakening in its effectiveness of operation and, as the assets and numbers of the banks outside the Federal Reserve System are increasingly strengthened, there may result a complete inability to accomplish the objects for which the System was created. The purpose of Congress in establishing the Federal Reserve System will thus be defeated, while the increasingly powerful group of banks outside the Federal system will exercise their growing influence upon credit and finance without the safeguards which Congress has deemed essential to the national interests.

It is submitted in conclusion that the statute before the Court is necessary to the continued existence and the effective operation of the Federal Reserve System and is constitutional.

Respectfully submitted.

WALTER WYATT,
General Counsel, Federal Reserve Board.
GEORGE B. VEST,
Assistant Counsel, Federal Reserve Board.

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 469

EX PARTE WORCESTER NATIONAL BANK OF WORCESTER, MASSACHUSETTS.

APPEAL FROM THE PROBATE COURT OF WORCESTER COUNTY, STATE OF MASSACHUSETTS.

MOTION FOR LEAVE TO FILE AND BRIEF OF COUNSEL FOR CONTINENTAL NATIONAL BANK AND TRUST COMPANY OF CHICAGO, AS AMICUS CURIAE.

CARL MEYER,
Counsel for Continental National Bank and Trust Company of Chicago, as Amicus Curiae.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 469

EX PARTE WORCESTER NATIONAL BANK OF WORCESTER, MASSACHUSETTS

APPEAL FROM THE PROBATE COURT OF WORCESTER COUNTY, STATE OF MASSACHUSETTS.

MOTION OF COUNSEL FOR CONTINENTAL NATIONAL BANK AND TRUST COMPANY OF CHICAGO FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

MAY IT PLEASE THE COURT:

The undersigned, as counsel for Continental National Bank and Trust Company of Chicago, respectfully moves this Honorable Court for leave to file the accompanying brief in this case, as *amicus curiae*.

CARL MEYER,
Counsel for Continental National Bank and Trust Company of Chicago, as Amicus Curiae.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 469

EX PARTE WORCESTER NATIONAL BANK OF WORCESTER, MASSACHUSETTS

APPEAL FROM THE PROBATE COURT OF WORCESTER COUNTY, STATE OF MASSACHUSETTS.

BRIEF OF COUNSEL FOR CONTINENTAL NATIONAL BANK AND TRUST COMPANY OF CHICAGO, AS AMICUS CURIAE.

The Interest of the Continental National Bank and Trust Company of Chicago.

The undersigned is asking leave to file this brief as *amicus curiae* by reason of being counsel for and at the request of the Continental National Bank and Trust Company of Chicago, which Bank was formed by consolidating the Continental and Commercial Trust and Savings Bank, a State bank organized under the laws of Illinois, with the Continental and Commercial National Bank under the charter of the latter bank, by virtue of the provisions of Section 1 of the Act of Congress of February 25, 1927 (c. 191, 44 St. 1224; Sec. 34a, Title 12, U. S. C. Sup. I, p. 53), popularly known as the McFadden Act and which by its terms became Section 3 of the Act of November 7, 1918 (c. 209, 40 Stat. 1043; U. S. C. Title 12, secs. 32, 33). This consolidation was made effective on November 30, 1927 and on that date the Comptroller of the Currency issued his certificate of ap-

proval of said consolidation. Immediately thereafter the Federal Reserve Board issued its permit to the consolidated bank to act as executor, etc. as provided for in the Federal Reserve Act.

At the time of the consolidation the National Bank had a capital surplus and undivided profits of approximately $51,000,000. and deposits of approximately $417,500,000., and the State Bank had a capital, surplus and undivided profits of approximately $17,700,000., and deposits of approximately $113,200,000. The State Bank likewise was acting as executor in a large number of estates and as trustee under trusts involving a large amount of money. The consolidated bank upon the consolidation ~~entered upon and~~ continued to administer all of such estates and execute all of such trusts which had theretofore been committed to the care of the State Bank.

The decision of the Massachusetts court which has been appealed from in the case at bar raises the question of the right of the consolidated bank to act as executor or trustee in connection with any of the estates or trusts which had before the consolidation been administered by the State Bank. It is submitted therefore that the above facts show sufficient reason for the application of the undersigned to file this brief.

It may not be out of place to advise the court in addition that there is now being consummated a consolidation of the business, interests and properties of the Continental National Bank and Trust Company of Chicago and the Illinois Merchants Trust Company, a State Bank organized under the laws of Illinois with a capital, surplus and undivided profits of approximately $47,500,000. and deposits of

approximately $374,500,000., which is likewise acting as executor and trustee in a large number of estates.

The difficulty suggested by the Massachusetts' decision will be entirely avoided in a consolidation between two State Banks under the laws of Illinois, inasmuch as the Supreme Court of Illinois in the case of *Chicago Title and Trust Company* v. *Zinser*, 264 Ill. 31, hereafter referred to, has definitely held that where two trust companies consolidate under the laws of Illinois, the consolidated company becomes by virtue of the consolidation entitled to execute trusts and administer estates theretofore committed to the care of one of the consolidating companies. The interested parties are therefore consummating the matter by having a transfer of the assets of the National Bank (excepting certain reserved assets and its trusts and trust assets) made to a State Bank organized under the laws of Illinois, which Bank will then be consolidated with the Illinois Merchants Trust Company under the laws of Illinois. This will of necessity result in a withdrawal from the National Banking System of the new consolidated bank which will be purely a State Bank.

ARGUMENT.

The sole question to be determined is whether Congress after first providing in Section 1 of the Act of February 25, 1927, *supra*, a method for consolidating a State with a National bank had the power under the Constitution to further provide that

> "all the rights, franchises and interests of such State or District bank so consolidated with a national banking association in and to every species of property, real, personal and mixed, and choses in action thereto belonging, shall be deemed to be transferred to and vested in such national banking association into which it is consolidated without any deed or other transfer, and the said consolidated national banking association shall hold and enjoy the same and all rights of property, franchises and interests including the right of succession as trustee, executor, or in any other fiduciary capacity in the same manner and to the same extent as was held and enjoyed by such State or District bank so consolidated with such national banking association."

That Congress has the power to authorize the consolidation of a state bank with a national bank cannot, in view of the decisions of this court, be seriously questioned. When the power of Congress to enact legislation permitting the conversion of a state bank into a national bank was attacked this court in no uncertain language definitely and for all time settled the question and said: "It was as competent for Congress to authorize the transmutation as to create such institutions originally." *Casey* v.

Galli, 94 U. S. 673. In fact Chief Justice Rugg, in the instant case, says (R. 19; 162 N. E. 217, 220):

> "We are unable to perceive any sound distinction between the power of Congress to authorize the conversion of a State bank into a national bank and its power to authorize the consolidation of a State bank with a national bank under the charter of the national bank. If no State legislation was necessary to accomplish such conversion, it seems to us that no State legislation is necessary to accomplish such consolidation. Relying upon the authority of *Casey* v. *Galli*, 94 U. S. 673, we are of opinion that in general consolidation of a Massachusetts trust company with a national banking association as prescribed in the Act of Congress of February 25, 1927, c. 191, Sec. 3, is permissible and valid."

This court has heretofore been called upon to define the status of the two banks after a conversion of a State bank into a national bank.

In *Metropolitan Bank* v. *Claggett*, 141 U. S. 520, an action was brought to recover on certain bank bills which had been issued by the Metropolitan Bank of New York, a bank which had afterwards been converted under the National Banking Laws into the Metropolitan National Bank. The defendant claimed that the state bank had closed its business of banking more than six years before, and that therefore under the laws of New York applicable thereto the liability on the notes in question was barred. This court in affirming the decision of the Supreme Court of New York which held defendant liable said (p. 527):

> "The court (New York court) decided that the New York statute providing for a redemption of circulating notes and for releasing the

bank, if the notes were not presented in six years, applied alone to banks 'closing the business of banking'; that the change or conversion of the Metropolitan Bank into the Metropolitan National Bank did not 'close its business of banking' nor destroy its identity or its corporate existence, but simply resulted in a continuation of the same body with the same officers and stockholders, the same property, assets and banking business under a changed jurisdiction; that it remained one and the same bank, and went on doing business uninterruptedly; * * *. This decision is so manifestly correct that it needs no argument to sustain it."

In *Michigan Insurance Bank* v. *Eldred*, 143 U. S. 293, a national bank which had been converted from a state bank known as the Michigan Insurance Bank, sued in the name of the Michigan Insurance Bank on a judgment rendered in favor of that bank before conversion. The defendant offered evidence showing the conversion in support of a plea of *nul tiel* corporation. This court said (p. 300):

"The evidence offered by the defendant on this point wholly failed to support this defence, and at most only proved that the plaintiff sued by the wrong name. It showed no more than that the plaintiff corporation, having been originally created by the laws of Michigan, had, in accordance with the National Banking Act, become a national bank, and its name been changed accordingly, without affecting its identity, or its right to sue upon obligations or liabilities incurred to it by its former name. Act of June 3, 1864, c. 106, s. 44; 13 Stat. 112; Rev. Stat. s. 5154; *Metropolitan Bank* v. *Claggett*, 141 U. S. 520; *Atlantic Bank* v. *Harris*, 118 Mass. 147; *City Bank* v. *Phelps*, 86 N. Y. 484; and 97 N. Y. 44."

This court has therefore definitely stated that even though upon such a conversion a new charter is issued by the federal authorities and the bank is no longer subject to the jurisdiction of the State of its original creation such change or conversion did not "destroy its (the State bank's) identity or its corporate existence" and that its name had been changed "without affecting its identity or its right to sue upon obligations or liabilities incurred by it by its former name".

How could language be stronger? In the Statute now before the court the State bank is authorized to *consolidate* with the National bank *under the charter of the latter*, whereas under the conversion statute the State bank is authorized to *convert* into a National bank *under a new charter*. Certainly no one can successfully contend that consolidation under an existing National charter creates more of a change in status than does conversion under an entirely new National charter. If the identity of the State bank or its corporate existence was not destroyed in the one case, then certainly its identity and corporate existence are not destroyed in the other.

The Massachusetts court seems to recognize the force of the decisions above quoted, but endeavors to minimize their effect by stating (R. 22, 162 N. E. at p. 221) that the expressions used by this court "were used in judgments touching contract litigation and must be interpreted as applicable to the facts then before the court", and that

> "such expressions and decisions occurring in different connections and rendered upon different issues cannot rightfully be stretched to include a situation like that here presented * * *. They are not applicable to the peculiar posi-

tions of trusts like executor, administrator and other fiduciaries."

The decisions, however, of this court in the two cases cited did not depend at all upon the question that a contract rather than a relation of trust was involved. The two decisions went squarely on the ground that when a state bank is converted into a federal bank under the provisions of the National Banking Act, neither the identity of the state bank nor its corporate existence was destroyed, but "it remained one and the same bank."

In addition to the two cases it is interesting to find what some other courts have held on the question.

In *City National Bank of Poughkeepsie* v. *Phelps*, 97 N. Y. 44 (1884), referred to with approval by this court in *Michigan Insurance Bank* v. *Eldred*, 143 U. S. 293, 300 *supra*, the defendant executed a guaranty to the City Bank of Poughkeepsie guaranteeing the payment of any sum not exceeding $5,000, which one Woodruff might require of the bank. The bank was afterwards converted into a national bank. The court in holding that the guarantor could be held for advances made to Woodruff *after the conversion* said:

> "The general scheme of the National Banking Acts is that State banks may avail themselves of its privileges and subject themselves to its liabilities, without abandoning their corporate existence, without any change in the organization, officers, stockholders, or property, and without interruption of their pending business or contracts. All property and rights which they held before organizing as National banks are continued to be vested in them under their new status. Great inconveniences might result if this saving of their existing assets did not include pending executory contracts, and

> pending guarantees, as well as vested rights of property. Although, in form, their property and rights as State banks purport to be transferred to them in their new status of National banks yet in substance there is no actual transfer from one body to another but a continuation of the same body under a changed jurisdiction. As between it and those who have contracted with it, it retains its identity, notwithstanding its acceptance of the privilege of organizing under the National Banking Act."

It has always been held that a contract of guaranty is of such a highly personal nature that running in favor of one person it cannot be taken advantage of by another, but the court found no difficulty in arriving at the conclusion that the national bank was entitled to make advances on the faith of a contract of guaranty running in favor of a state bank from which it had been converted, as the National bank was "but a continuation of the same body".

To the same effect as *City National Bank of Poughkeepsie* v. *Phelps, supra,* is *First National Bank of Pontiac* v. *Talbert,* 103 Mich. 625; 61 N. W. 888 (1895) where it appeared that a statute of Michigan provided that upon dissolution of a national bank it could be reorganized into a state bank in which should vest all of the assets of the national bank. One Talbert prior to such a reorganization executed a document guaranteeing the national bank on the renewals it might make of the paper of one Moore. The state bank resulting from the reorganization renewed certain notes of Moore, and the court in holding that Talbert was liable to the state bank on these renewals said that the case was

> "precisely analogous to *City National Bank* v. *Phelps,* 97 N. Y. 44."

In *Poisson* v. *Williams,* 15 Fed. (2nd) 582 (D. C. N. C. 1926), in holding that a trust should be imposed upon certain funds in the hands of the Receiver of a national bank which some time before had been converted from a state bank, the court said:

> "There can be no question that the American Bank & Trust Company received and held the proceeds of the sale of the tram road and equipment as trustees of an express trust, or that the funds in its hands constituted a trust fund for the benefit of the bondholders secured by the deed of trust; and I think it is equally clear that, if the trust fund was in the vaults of the bank when it was converted into a national banking association, it continued to be impressed with the trust in favor of the bondholders. The change from a state to a national bank did not 'destroy its identity or its corporate existence, but simply resulted in a continuation of the same body, with the same officers and stockholders, the same property, assets, and banking business under a changed jurisdiction.' *Metropolitan Bank* v. *Claggett,* 141 U. S. 520, 12 S. Ct. 60, 35 L. Ed. 841; 7 C. J. 760; and cases cited; note, 59 Am. St. Rep. at page 553."

If it is established as we believe it has been established by the decisions above referred to that a national bank converted from a state bank is but a continuation of and identical with the state bank, and if Congress has the power to confer upon national banks the right to act as trustee, executor, etc., when not in contravention of state law (*First National Bank of Bay City* v. *Fellows,* 244 U. S. 416) and to declare that where the laws of a state authorize banks or trust companies to exercise trust functions the exercise of such powers by national

banks shall not be deemed in contravention of state law (*State of Missouri ex rel. Burnes National Bank* v. *Duncan*, 265 U. S. 17), it would seem to logically follow that Congress has the power to declare that a national bank resulting either from conversion of a state bank or from the consolidation of a national bank with a state bank shall be entitled to act as executor and trustee in cases where the state bank was so acting before conversion or consolidation.

There is likewise an abundance of authority to show that corporations with trust powers consolidating under statutes which provide in substance that the consolidated corporation shall hold and enjoy "all the rights of property, franchises and interest, including the right of succession as trustee, executor or in any other fiduciary capacity in the same manner and to the same extent as was held and enjoyed," etc. are entitled to exercise trusteeships and executorships theretofore vesting in either of the consolidating corporations.

In *Chicago Title and Trust Co.* v. *Zinser*, 264 Ill. 31, 105 N. E. 718 (1914) *supra*, the Supreme Court of Illinois held that where two Illinois corporations, the Real Estate Title and Trust Company and the Chicago Title and Trust Company were pursuant to the laws of Illinois consolidated under the name of the latter corporation, letters were properly issued to the consolidated corporation to act as executor and trustee under a certain will in which the Real Estate Title and Trust Company had been so named. The consolidation of the two corporations had taken place after the making of the will, but before the death of the testatrix.

In a bill for specific performance brought by the consolidated corporation as executor, the question was raised as to whether the deed theretofore tendered to the defendant by the consolidated corporation, had been tendered by some person or corporation having power to act under the will.

The Court said (264 Ill. at p. 35):

> "By the consolidation of the Real Estate Title and Trust Company and the Chicago Title and Trust Company the original corporations *ceased to exist*, and the appellee, as the consolidated corporation, *acquired* and *succeeded* to all the faculties, property, rights and franchises of its component parts and became subject to all the duties, obligations and conditions imposed upon them. (*Robertson* v. *City of Rockford*, 21 Ill. 451; *Chicago, Rock Island and Pacific Railroad Co.* v. *Moffitt*, 75 id. 524.) The material question here is whether the general rule that a trustee cannot delegate his authority to another is an obstacle to the exercise of a power by the appellee to act as executor or trustee where one of the constituent corporations was named as such. That general rule rests upon the ground that the selection of a trustee implies personal confidence in his discretion and judgment. If a power is given to an executor or trustee which is not ministerial or given for the purpose of executing a declared trust which the court can enforce but which involves the exercise of discretion and judgment, the power cannot be delegated or transferred to another, either by the trustee or a court. The rule, however, cannot be applied to the case of a corporation, because the element of trust in the judgment and discretion of an individual is entirely wanting. A corporation is without personality, and if it is selected as trustee or executor there can be no reliance upon individual discretion or even upon

the continuance of the same administration. Etta Nelson, in naming the Real Estate Title and Trust Company as executor and trustee, knew that its directors, officers and stockholders might change from time to time, and that the statute authorized a change of name or place of business, enlargement or change of the object for which the corporation was formed, an increase or decrease of capital stock or change in the number of shares or par value, increase or decrease of the number of directors, and the consolidation of the corporation with any other corporation then existing or that might thereafter be organized. She therefore contemplated that these changes might occur and that the Real Estate Title and Trust Company might be consolidated with some other corporation such as the Chicago Title and Trust Company, and that it would thereby *cease* to exist and become a component part of a new corporation. A consolidation took place and a new corporation was created from the original corporations, with an enlarged capital stock and unimpaired franchises. The appellee was entitled to execute the trust, and the chancellor did not err in overruling the demurrer."

In *In re Bergdorf's Will*, 206 N. Y. 309, 99 N. E. 714 (1912) the Court of Appeals of New York held that where a trust company was designated as trustee under a will, and after the testator's death it had been merged into a second company, the second company was entitled to act as executor under the provisions of the New York statutes which provided that upon such merger all the rights, franchises and interests of the merged company should vest in the second company and empowering the second company to hold and enjoy all the rights, property, fran-

chises and interests of the first company. The court said:

> "The designation of the Morton Company (the first company) as an executor created a privilege or an interest in the estate of the testator appertaining to that company. The privilege or interest was not complete or vested. * * * The merger transferred it to the Guaranty Company, and, in effect, substituted that company for the Morton Company. The Guaranty Company was entitled to hold and enjoy it even as would the Morton Company under an unmerged existence. By virtue of the statute, effective as a part of the will, the Guaranty Company was designated as an executor, and as such, is entitled to receive the letters testamentary."

In *Mercantile Trust Co.* v. *San Joaquin Agricultural Corporation*, 265 Pac. 583 (1928), the California Court of Appeals held that under a statute providing that upon consolidation of banks and trust companies, the consolidated bank should succeed to the properties, trusts, claims, demands, etc., of the two corporations consolidating, the consolidated corporation was entitled to act as trustee under a mortgage executed before the consolidation and in which one of the consolidating corporations was named as trustee.

In view of the foregoing the conclusion seems almost irresistible that a State bank could be converted into a National bank carrying with it all trusts and trust powers and that such National bank could then consolidate with another National bank which consolidated bank would thereby be clothed with all the trusts and trust powers of the original State bank. If such be the fact, then it seems clear

that Congress has the power to accomplish this same result by the direct method of consolidation adopted in the McFadden Act, *supra*.

Congress by the statutes here under consideration has in effect declared that a state bank or trust company which has been appointed executor or trustee or has the right to be appointed as such shall not be penalized by forfeiting those offices or that right when it is transmuted into a National banking system by consolidation with a National bank.

The fallacy of the Massachusetts court's reasoning is due to its unwillingness to recognize that for the purpose of carrying out its obligations the State bank is still in existence and therefore there has been no usurpation of judicial functions or authority and no substitution of a new executor without the authority of the court. The Fitchburg Bank and Trust Company has been consolidated with the Worcester County National Bank and for the purpose of carrying out all trusts, executorships and other fiduciary relations entrusted to its care is still in existence, although under a different name and different charter, as held in the Claggett and Eldred cases. The very same arguments on which the Massachusetts court bases its judgment were made in the *Fellows* and *Burnes cases, supra*.

It is respectfully submitted that the order appealed from should be reversed and the cause remanded to the Probate Court of Worcester County, Massachusetts, with directions to that court to proceed accordingly.

Respectfully submitted,

CARL MEYER,

Counsel for Continental National Bank and Trust Company of Chicago, as Amicus Curiae.

(20)

SUPREME COURT OF THE UNITED STATES.

No. 469.—October Term, 1928.

Ex parte Worcester County National Bank of Worcester, Appellant. } Appeal from the Probate Court for Worcester County, State of Massachusetts.

[May 13, 1929.]

Mr. Chief Justice Taft delivered the opinion of the Court.

The Worcester County National Bank is a consolidated banking corporation formed by uniting, on June 27, 1927, the Fitchburg Bank & Trust Company, a State institution of Massachusetts, and the Merchants National Bank of Worcester, a national bank of Worcester County, Massachusetts, under the Act of Congress of February 25, 1927, c. 91, 44 Stat. 1224, amending the Act of November 7, 1918, c. 209, 40 Stat. 1044. The amendment added a new section, 3, and this case turns chiefly on the construction, effect and validity of that new section.

The consolidated bank filed in the Probate Court of Worcester County a first and final account of the Fitchburg Bank & Trust Company, executor of the last will and testament of Julia A. Legnard, late of Fitchburg in the county of Worcester. The account was for the period beginning April 21, 1926, and ending February 9, 1928. The account was rendered by the Worcester County National Bank for the Fitchburg Bank & Trust Company to June 27, 1927, and thereafter as its own account.

The Fitchburg Bank & Trust Company had been appointed by the Probate Court executor of the will of Julia A. Legnard on April 21, 1926, and qualified by giving bond approved on that day.

The consolidated bank claimed that in view of the proceedings, its right and duty was to render the account presented for allowance, and as all the parties interested had assented to it, that it should be allowed by the Court.

The Probate Court found that the account was in proper form for allowance and should be allowed as rendered, if the said Wor-

cester County National Bank, as successor or otherwise, was executor of said will or had the right to render the account.

The Probate Judge reported a certificate from the Comptroller of the Currency that the two banks had complied with all the provisions of the Acts of Congress and had been consolidated under the charter of the Merchants National Bank with the capital stock of $1,875,000, that the consolidation had been approved, and that pursuant to the Federal Reserve Act, enacted December 23, 1913, § 11 (k), c. 6, 38 Stat. 251, 262, the consolidated bank had permission to act as executor.

He further reported that many estates were being administered by the consolidated bank under a claim of right where the Fitchburg Bank had been appointed administrator, executor or in some other fiduciary capacity, and no new appointment of the consolidated bank in place of the Fitchburg Bank had been made by decree of the Probate Court.

He concluded the report as follows:

"Without action upon said account, I report the above facts and the question of law involved, for the consideration and determination of the Full Court, as to whether the petitioner is entitled to render said account.

"Fredk. H. Chamberlain,
Judge of Probate Court."

After a hearing on the report, a rescript of the Supreme Judicial Court was as follows:

"Ordered that the register of probate and insolvency in said county make the following entry under said case in the docket of said court, viz: The question reported, namely, 'Whether the petitioner is entitled to render said account', is answered in the negative. Probate Court instructed accordingly."

Following the rescript, the Probate Court made the following entry:

"The foregoing account having been presented for allowance, after rescript from the Supreme Judicial Court (Full Court) and pursuant to the terms of said rescript, it appearing that the Worcester County National Bank of Worcester, the accountant and petitioner in this case, has not succeeded the Fitchburg Bank & Trust Company as executor of the will of said testatrix and is not entitled to render this account, this petition for the allowance of the same is hereby dismissed."

A petition for appeal to this Court, with an assignment of errors, was filed, and an appeal was allowed under Section 237 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 937.

The Supreme Judicial Court stated its reasons for the conclusion reached in an elaborate opinion. 162 N. E. 217.

The court began with a statement of the substance of Section 3 of the Act of February 25, 1927, c. 91, 44 Stat. 1224, 1225, providing that any bank, including a trust company incorporated under the laws of any State, may be consolidated with a national bank located in the same county under the charter of the national bank, on such terms and conditions as may lawfully be agreed upon in the manner specified; that all the rights, franchises, and interests of the State bank in and to every species of property, real, personal and mixed, and choses in action thereto belonging, shall be deemed to be transferred to and vested in such national bank into which it is consolidated, without any deed or transfer; and that the national bank shall hold and enjoy all this property, franchises and interests, including the right of succession as trustee, executor, or in any other fiduciary capacity, in the same manner and to the same extent as was held and enjoyed by the State bank. The section closes with the limitation: "No such consolidation shall be in contravention of the law of the State under which such bank is incorporated."

The court examined the question whether there was any statute of Massachusetts or any policy declared in its statutes which prevented or forbade such consolidation, and found that there was none, but pointed out that there was a provision in the General Laws of Massachusetts, c. 172, Sec. 44, as amended by Stat. 1922, c. 292, which should be regarded as a limitation upon such consolidation, as follows:

"The charter of a trust company, the business of which shall, on or after July 1, 1922, be consolidated or merged with, or absorbed by, another bank or trust company, shall be void except for the purpose of discharging existing obligations and liabilities."

With this qualification, the court found the field to be left open, under Massachusetts law, to the exercise by Congress of whatever power it possessed over the subject. The court then considered the Congressional power, and cited the case of *Casey* v. *Galli*, 94 U. S.

673, to show that under Section 44 of the Banking Act of Congress, c. 106, 13 Stat. 99, 112, a State bank could change its organization into that of a national bank without any authority given by the State in its charter or otherwise to make the change. The Supreme Judicial Court could not find any distinction between the power of Congress to authorize the conversion of a State bank into a national bank and its power to authorize the consolidation of a State bank with a national bank under the charter of the National Bank, and concluded that if no State legislation was necessary to accomplish the conversion, there was no legislation necessary to accomplish consolidation, and that the consolidation of a Massachusetts trust company with a national bank under the Section 3 of the Act of Congress of February 25, 1927, was permissible and valid.

The court then considered what was the legal effect of the consolidation on the Trust Company and the National Bank, and emphasized the explicit provision of Section 3 that the consolidation was to be under the charter of the National Bank. It referred again to the provision of the State law that upon the consolidation, the charter of the Trust Company should be "void except for the purpose of discharging existing obligations and liabilities." It held that the word "franchises" directed to be transferred to the National Bank by virtue of Section 3 did not mean its charter or its right to be a corporation, for that would be in contravention of the law of the Commonwealth; that it was only the National Bank that retained its corporate identity; that the certificate of the Comptroller did not constitute a charter, but only his approval of the consolidation; that the Trust Company had gone out of existence and all its property had become the property of the consolidated bank; and that the latter was not a newly-created organization, but an enlargement of the continuously existing National Bank. Thus the court found that the identity of the Trust Company had not been continued in a national bank, but had been extinguished. The court distinguished this case from cases of union where contract obligations had been held to pass from one of the uniting corporations to the other. Such cases were held not to be applicable to sustain the view that positions of trust like executor, administrator and other fiduciaries could be transferred to the National Bank by the mere consolidation under Massachusetts law.

The court then set out at some length the reasons why under the Constitution and practice of Massachusetts the appointment of an executor was a judicial act and that in the case before the court no one could succeed to the void and defunct State Trust Company as executor except by appointment by the Probate Court. The trust involved was highly personal. The court said:

"To treat the national banking association into which the State trust company has been consolidated as preserving the identity of the trust company in this particular would be contrary to the juridical conception and practice touching the appointment of such fiduciaries under the law of this Commonwealth."

The third question the court discussed and decided was the validity and binding effect on courts of Massachusetts of the declaration in Section 3 of the Act of Congress that the right of succession as trustee, executor or in any other fiduciary capacity, would follow to the same extent as it was held and enjoyed by such State bank. It first inquired what was its meaning, and held that it meant that the original appointment of the State bank was to continue wholly unaffected by the fact that the State bank had ceased to be, and that another and different corporation, whose credit, standing and competency had never been the subject of judicial inquiry for this purpose must be substituted by virtue of Section 3. The court found that this result was in contravention of the law of the Commonwealth and contrary to the State and Federal Constitutions.

The court found, however, that this provision was not the dominant part of Section 3, that the clause was separable and distinct, that the rest of the section could stand independently and that there was no such connection between the two as to indicate that Congress would not have enacted the valid part without the other.

The court, therefore, held that the Worcester County National Bank of Worcester, the accountant and petitioner in the case at bar, had not succeeded the Fitchburg Bank & Trust Company as co-executor of the will of the testatrix and was not entitled to render an account as such executor, that it could only account as executor *de son tort*, and that the question of the Probate Court must be answered in the negative.

In passing on this appeal, we must observe that in determining the policy of a State from its statutes and their construction, we of course follow the opinion of the State court except as it may be

affected by the Federal Constitution. When, therefore, the State court holds that an executor to act as such in the State, must be appointed by the Probate Court, this Court must respect that conclusion and act accordingly. But when the question arises as to what is the proper interpretation and construction of Federal legislation, this Court adopts its own view.

It is very clear to us that Congress in the enactment of Section 3 of the Act of February 25, 1927, was anxious even to the point of repetition to show that it wished to avoid any provision in contravention of the law of the State in which the State trust company and the national bank to be consolidated were located. So strongly manifest is this purpose that we do not hesitate to construe the effect of Section 3 in Massachusetts to be only to transfer the property and estate from the trust company to the national bank to be managed and preserved as the State law provides, for administration of estates, and not to transfer the office of executor from the State trust company to the succeeding national bank. As this requires another judicial appointment by a probate court, it would become the duty of a consolidated national bank, after the union, immediately to apply for the appointment of itself as executor, subject to the examination and approval of the proper probate court. Because of the interest of the National Bank in all of the assets of the Trust Company, including the estate at bar, transferred to its custody, the Bank would seem to have a right to make such an application to the Probate Court and await the action of that court. If, on the other hand, it assumed improperly that it was made an executor by the mere consolidation, and held the transferred property as such, it must be held to have become an executor *de son tort* and should bring the assets before the Probate Court and proceed by proper application to secure the appointment of a legal executor by the court, as pointed out by the Supreme Judicial Court in this case and in *Commonwealth-Atlantic National Bank*, 261 Mass. 217, and *Commonwealth-Atlantic National Bank*, 249 Mass. 440.

These views lead us to agree with the conclusions of the Supreme Judicial Court in respect to the legality of the consolidation of the Trust Company and the National Bank and only to differ from it in its construction of Section 3, by which it would hold that section unconstitutional under the Constitution of Massachusetts, and so under the Constitution of the United States.

We think Section 3 enjoins upon the National Bank complete conformity with the Massachusetts law in its conduct of estates of deceased persons when acting as trustee or administrator thereof.

The Supreme Judicial Court refers in its opinion in this case to that of *Commonwealth-Atlantic National Bank of Boston*, 261 Mass. 217, as showing that the consolidated bank in this case could not act as executor. In that case a State trust company was appointed by the probate court as trustee under wills in two cases and as conservator of property in a third. It qualified by giving bond and for some time held and administered the property as fiduciary. Thereafter it was converted into a national bank, which still later was consolidated with another national bank. No new appointment as trustee was made by the probate court. The consolidated national bank petitioned for allowance of accounts as fiduciary. The court held that while the accounts were accurate and complete, the consolidated bank was not a duly appointed fiduciary merely by virtue of the original appointment of the State trust company, and could only account *de son tort*. The court relied on *Commonwealth-Atlantic National Bank of Boston*, 249 Mass. 440. There a State trust company was named as executor in a will. Thereafter it became converted into a national bank, which still later was consolidated with another national bank. The testator having died, the consolidated national bank petitioned for the issuance of letters testamentary to it as the executor named in the will. The court held that it was not the executor named therein, and that the designation of the State trust company as executor did not confer on it a property right passing to its successor, the consolidated national bank.

The court in both *Commonwealth-Atlantic Bank* cases accepted the effect of the decisions in *First National Bank of Bay City* v. *Fellows*, 244 U. S. 416, and *Burnes National Bank of St. Joseph* v. *Duncan*, 265 U. S. 17, the latter holding that national banks may act as executors in a State where State trust companies have that privilege. The court in 249 Mass. said, "We accept, as we are bound to accept, that principle in all its amplitude and with all its implications", but said that "that principle does not reach to the facts here presented." There was similar language in 261 Mass. The Supreme Judicial Court did not then hold and has not held that a Probate Court of Massachusetts may not appoint a national bank,

otherwise qualified, to be executor, administrator or trustee, if it approves one as such. In construing Section 3, we think it to be in conformity therewith for the national bank after consolidation to apply to the Massachusetts Probate Court for appointment as a succeeding fiduciary to carry on the duties. In the present case, no such appointment has been made by the Probate Court.

Under the Massachusetts authorities as already cited the Bank in attempting in this case to act as executor has become an executor *de son tort*, and that situation must be disposed of in accordance with the laws applicable in Massachusetts to such a situation. *Claiborn* v. *Phillips*, 245 Mass. 47. When the executor *de son tort* has been released, it would seem that application might be made to the Probate Court for appointment of the National Bank as executor to close the estate. It seems to us that our construction of Section 3 of the Act of 1927 in differing from that of the Supreme Judicial Court of Massachusetts makes it possible by the appointment of the Probate Judge, if he approves, to enforce the requirements which the laws of that State impose in the execution of such trusts, and still preserve the constitutional effectiveness of Section 3.

This result requires us to affirm the dismissal of the petition of the Worcester County National Bank in seeking to render the first and final account of the Fitchburg Bank & Trust Company as executor of the last will and testament of Julia A. Legnard, deceased, and its own account as executor of her will, but to remand the cause to the Probate Court for a proceeding by the petitioner as executor *de son tort*, and for such further proceedings as it may be advised and as are permissible by the laws of Massachusetts and the statutes of the United States not inconsistent with this opinion.

And it is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.